In The

Supreme Court of the United States

October Term, 1979

No. 79-6182

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SUPREME COURT, U.S.

RICHARD GRAHAN,

Petitioner,

-against-

THE PEOPLE OF THE STATE
NEW YORK,

Respondents.

Petition for a Writ of Certiorari to the Appellate Division of the Supreme Court of the State of New York, Third Judicial Department.

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2. (a) The decision below demonstrates the continuing reluctance of New York Courts to abandon the reasonable suspicion standard of People vs Morales, 25 N.Y.2d 55, reversed sub. nom. Morales vs N.Y., 396 U.S. 102, and to adopt the requisite standard of probable cause; (b) the absence of probable cause in this case is so egregious as to warrant intervention of this Court. 17

3. This case was decided on the authority of People vs Payton and Riddick, 45 N.Y.2d 300. This Court should grant certiorari herein in order to be able to dispose of this case in light of its decision to be rendered in Payton and Riddick. 19

4. The Appellate Division concedes that the motel search violated the Rule of Chimel vs California, 395 U.S. 752, but justifies the search and receipt of the items seized into evidence on the basis of the confession which followed and is a product of the search. Such a ruling violates fundamental rulings of this Court and warrants the corrective review of this Court. 22

5. This Court should review the decision below because the Appellate Division refused to suppress the fruits of a general search in violation of principles long and clearly enunciated by this Court. 23

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In The

Supreme Court of the United States

October Term, 1979

No.

RICHARD GRAHAM,

Petitioner,

-against-

THE PEOPLE OF THE STATE OF NEW YORK,

Respondents.

Petition for a Writ of Certiorari to the Appellate Division of the Supreme Court of the State of New York, Third Judicial Department.

The petitioner, Richard Graham, prays that a writ of certiorari issue to review the order of the Appellate Division of the Supreme Court of the State of New York, Third Judicial Department, dated and entered on August 8 , 1979, which became the final decision of the highest Court of the State by virtue of denial of leave to appeal to the Court of Appeals of the State of New York, rendered on December 3, 1979, by the Hon. Lawrence H. Cooke, Chief Judge of the State of New York. Review is sought to the extent the order of the Appellate Division affirms the judgment of conviction for intentional murder 2d (Penal Law §125.25[1]) and felony murder 2d (Penal Law §125.25[3]).

OPINIONS BELOW

The opinion of the Appellate Division of the Supreme Court of the State of New York, Third Judicial Department (Appendix A) is reported at 69A.D.2d 544, 419 N.Y.S.2d 290. The opinion of the Sullivan County Court denying the suppression motions of Petitioner, and Richard Lucas, the motions having been heard

together, (Appendix B) is reported at 90 Misc 2d 1019, 396 N.Y.S.2d 966.

JURISDICTION

The order of the Appellate Division of the Supreme Court of the State of New York, Third Judicial Department, was dated and entered on August 8, 1979. Reargument was denied by order dated and entered October 5, 1979.

Leave to appeal to the Court of Appeals of the State of New York was denied by certificate of the Hon. Lawrence H. Cooke, Chief Judge of the State of New York, dated and mailed December 3, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3).

QUESTIONS PRESENTED FOR REVIEW

1. Where police break into Petitioner's motel room to arrest Petitioner, knowing the occupants to be asleep, without giving notice of their presence and authority and without giving the occupants an opportunity to admit them and where the police rely on the claimed exigencies of the presence of a dog (which was not on the premises) and of the possibility that the occupants might be armed, was Petitioner's arrest unconstitutional?

2. Where Petitioner and his companions went to Florida soon after the murder of a courier, whose job had been held by Petitioner and where the main connection of Petitioner to the crime is that one of his companions had been seen near the courier's bank at least one-half hour before the courier set out for the bank, did the police have probable cause to arrest Petitioner without a warrant.

3. Did the police require exigent circumstances to enter Petitioner's motel room to effect a warrantless arrest?

4. Did the police have exigent circumstances to effect the warrantless arrest of Petitioner in his motel room?

5. Where evidence is seized in violation of the rule of Chimel vs California, may it and the fruits thereof be received in evidence because giving rise only to "faint prejudice" to Petitioner rather than of no effect beyond a reasonable doubt?

6. Where the police thoroughly searched the motel room including the closets, drawers, and chests, and seize every item (but one) belonging to the occupants, have the occupants been subjected to an unconstitutional general search?

7. Where the Court uses truthfulness as a criterion for determining the voluntariness of Petitioner's confession, should the decision that the confession was given voluntarily be reversed?

8. Where the police had the Lincoln automobile under surveillance for four days, having searched the car under a warrant on the first day, may they search the car again on the third day without obtaining a new warrant?

9. Is the second search of the Lincoln improper as part of an unconstitutional general search?

10. May the police seize the Lincoln on the fourth day of surveillance without obtaining a warrant to do so?

11. Should Petitioner's confession and the evidence seized in the foregoing searches and the fruits thereof be suppressed?

STATUTES INVOLVED

N.Y. Criminal Procedure Law
§120.80(4) (b):

§120.80 Warrant of arrest; when and how executed.

4. In order to effect the arrest, the police officer may, under circumstances and in a manner prescribed in this subdivision, enter any premises in which he reasonable believes the defendant to be present. Before such entry, he must give, or make reasonable effort to give, notice of his authority and purpose to an occupant thereof, unless there is reasonable cause to believe that the giving of such notice will:

****

(b) Endanger the life or safety of the officer or another person;

N.Y. Criminal Procedure Law
§140.15(4):

140.15 Arrest without a warrant; when and how made by police officer.

****

4. In order to effect such an arrest, a police officer may enter premises in which he reasonably believes such person to be present, under the same circumstances and in the same manner as would be authorized, by the provisions of subdivisions four and five of section 120.80, if he were attempting to make such arrest pursuant to a warrant of arrest.

FACTS

At 8:00 a.m. on October 19, 1975, petitioner was asleep in his bed in his motel room in Fort Lauderdale, Florida. Immediately thereafter, officers of the Florida Division of Criminal Investigation and the Broward County Sheriff's Office, accompanied by New York State Troopers, broke into his room, with pistols drawn, and arrested the defendant for the murder, kidnapping, and robbery of one Craig Mitton, which allegedly took place on October 13, 1975. (R/A 287, 400, 409-10) *

The police entered defendant's room without any notice of any kind, gaining entry by use of passkey obtained from the motel management. (R/A 341, 400)

The police had no warrant for the arrest of defendant. No warrant had been issued and no Court proceedings had been initiated. A warrant was not issued until the next day. (R/A 429)

Police also arrested the defendant's "fiancee" who was in the room with him. She was arrested for the same crimes. (See p. infra; R/A 473, T1706)

In the adjoining room, the police under similar circumstances arrested one Richard Lucas and his girlfriend, Cheryl Kilb. (See page 44, infra; R/A 345-7, 396, 497-8, T1706)

The police had had the motel rooms under constant surveillance since about 11:00 a.m. on the previous day. (R/A 277, 397-8)

During the surveillance the police occupied the rooms on either side of Graham and Lucas. Each police room had a connecting door with one room of Graham or Lucas, whose rooms did not interconnect. The only other egress from the rooms was on to a corridor under surveillance. (R/A 333-8, 342-3, 398, 401) During the first 18 hours of the surveillance petitioner and his three companions had been away from the motel, sightseeing and at entertainment spots. Although the police knew the license plate of their car and the other descriptive information to identify it, no attempt had been made to locate and arrest them. (R/A 336-7, 395-6)

Petitioner and his companions returned to the motel at about 6:00 a.m. on October 19, 1975. (R/A 311). Again, no attempt was made to arrest them, although at least ten officers were present on stakeout.

Police made a conscious decision to wait until they thought the four were asleep before effecting an arrest. (R/A 311-12) Correctly assuming the four to be asleep, the police broke into the rooms at 8:00 a.m. (R/A 345, 498)

The four had traveled to Florida about four days earlier bringing a doberman pinscher with them. They had boarded the dog with a veterinarian several days before the arrest. (R/A 724-5) During the twenty hours of surveillance the police, naturally, had not heard the dog bark nor was the dog with the four when they returned to the motel. The police had no information about the dog's whereabouts since the four had checked into the motel. There was no proof concerning the propensities of the dog, other than its name. One of the arresting officers owned a doberman. Ownership of a doberman in Florida was not illegal in any way. (R/A 343) Immediately on entering the room the police searched for guns. There were no guns in the room. (R/A 345)

The four arrestees were permitted to dress and were taken to the Broward County Sheriff's office, arriving at about 8:30 a.m. (R/A 288-9, 759) All of them, with the exception of Cheryl Kilb, were handcuffed. (R/A 412, 474)

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* References are to the record on appeal, which is numbered in two sequences. The suppression hearing pages are numbered starting at R/A 1, while the trial transcript and other documents are numbered starting at R/A-T1.

After the four had been removed from the motel room police began a thorough search of the rooms, closets, dressers, and luggage. They then [illegible] seized every item in both rooms that belong to the arrestees, excepting only the [illegible] (R/A 521-4, 524-525) A list of the items seized is set forth as Appendix F to this petition at pages 68-70, infra.

At about 9:00 a.m. petitioner signed a "Miranda" form, indicating his willingness to give a statement without an attorney. (Suppression Exhibit 38, R/A [illegible] 293, T1816)

Petitioner was again questioned at about 10:55 a.m. (R/A 353-5, 447-8) In the interim the evidence seized had been brought into the room in which he was being [illegible]. (R/A 354-5) (The items were used both in questioning petitioner and the two women [R/A 489, 504, 697-8, 760, 76[illegible], 822-3, 823].)

During the intervening period, petitioner's request to see his "fiancee" had been denied. (R/A [illegible] 963-4)

Petitioner started his confession at about 11:00 a.m., finishing it at about 11:45 a.m. (R/A [illegible] 1, 294, 319-23, 353, 446-8) Thereupon, he was permitted to see his "fiancee" and to have lunch with her. And, at about [illegible] p.m., he was brought before a judge in the same building. (R/A 518, 959, suppression exhibit 69-70) (Both women were released later in the day after giving statements [R/A 480-1, 502, 503]; the trial court found that both had been arrested; but no charges were lodged against either of them. [See page 44, infra; R/A [illegible]1706].)

Petitioner and Lucas had been arrested for the murder, kidnapping and robbery in New York State of one Craig Mitton on October 13, 1975.

The Court found that the police acted on the following facts to establish probable cause:

> Before they arrested the defendant, the police officers knew: that Mitton had been the victim of a robbery and murder; that Lucas and another person had been seen near the bank close to the time Mitton was to arrive; that the defendant had recently been fired from the same job Mitton had;

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> that Lucas and the defendant had made plans to leave the area; that although neither Lucas nor the defendant was registered at the Downtowner Motel, Lucas left his car there, rather than at the airport; that the defendant and Lucas were registered in the Florida motel under false addresses; and that Lucas had told a person in the Walden, New York area not to disclose their whereabouts. Thus, the police had done more than merely place Lucas near the bank at about the time of the robbery. Indeed, the police had reason to conclude that Lucas and Graham had fled the area. (P. 304, infra.)

On October 17, 1975, the New York State police, acting together with the Newark Police Department, and acting under a search warrant, conducted for "several hours" a thorough search of Lucas's car at the Gateway Downtowner Motel at Newark, New Jersey. (R/A 144) The search was extremely thorough and they seized fingerprints and nearly every loose object in the car, including vacummings. The list of items seized is set forth as Appendix G, pages 71-88, infra. The seizure was so complete that when they revacummed the car on October 20, 1975, they obtained no new sweepings. (R/A 117-8)

After the search and seizure on October 17, 1975, the police kept the Lincoln under constant surveillance until they seized it on October 21, 1975, and removed it to the State of New York. (R/A 147-8, 273)

On October 20, 1975, without obtaining a new warrant the police searched the car a second time. New sweepings were done and new fingerprints were taken. These fingerprints established for the first time, on the day after the arrest, a connection between Mitton and the Lincoln. These fingerprints are the only

evidence of such a connection. (R/A T835-45)

On the trial, notwithstanding petitioner's confession, a substantial issue developed as to whether or not Lucas and petitioner in fact killed Mitton. Dr. Milton Gross, then Chief Medical Examiner of the State of Connecticut and now Chief Medical Examiner of the City of New York, testified that Mitton both was shot and died at a time when the People acknowledge that Mitton could not have been killed by petitioner who had already left for New York on their trip to Florida. Dr. Gross testified that the shooting could have occurred no earlier than 1:00 a.m. on October 14, 1975. (R/A - T1203-4) The People's proof indicated that Lucas and Graham arrived at New Windsor, New York between 8:00 p.m. and 9:00 p.m. on October 13, 1975, and left soon thereafter for Newark, New Jersey on their trip to Florida. (R/A T103, T1293-4, T1342)

At his suppression hearing, in addition to Fourth Amendment issues, the petitioner raised the issue of the voluntariness of his confession. In deciding the question of voluntariness, the Trial Court, now affirmed by the Appellate Division, used his belief in the truthfulness of the confession as a factor in determining the voluntariness of the confession. (R/A 822-31)

STAGE AT WHICH ISSUES RAISED

Each of the issues raised herein was first raised on Petitioner's motion in the Sullivan County Court to suppress his confession and the evidence seized in the various searches herein, together with the fruits thereof.
Each of the issues, with one exception, was resolved against Petitioner in the decision of the County Court. (Appendix B, p. 33, infra). The issue of truthfulness as a criterion for voluntariness was resolved against Petitioner by the Sullivan County Court on the record. (p.24, infra).

The Appellate Division held against Petitioner on all suppression issues, except that it assumed that the motel search was conducted in violation of Chimel vs California, but concluded that the Petitioner was not prejudiced thereby. (Appendix A, p.28, infra.)

The Reasons for Granting The Writ

1. This case squarely presents the question of the definition of the constitutional limitations on noticeless entries to effect arrest, and thus raises an important question of Constitutional Law which, to date, has not been, but should be, decided by this Court.

The Appellate Division held below that the noticeless entry of the police into the bedroom of the sleeping petitioner was not illegal because of the existence of exigent circumstances. (See page 31 , infra.)

The Court relied on the possible existence of the doberman pinscher and of guns in the room as constituting the exigent circumstances. Its reliance in that regard is contrary to an almost unbroken line of cases, discussed below, that the possibility of the arrestee being armed negates the justification for a noticeless, as opposed to a warrantless, arrest.

Furthermore, the facts relied on by the Appellate Division do not warrant a finding of exigent circumstances.

In Ker vs California, 374 U.S.23, Mr. Justice Clark wrote, for four members of the Court, that "the method of entering the home may offend federal constitutional standards of reasonableness and therefore vitiate the legality of an accompanying search." (Ker vs California, 374 U.S. 23, 38.)

Notwithstanding the recurrence of the issue, this Court has yet to hold that a constitutional right exists, to define its limits, or to define the exceptions, if any, which would justify a noticeless entry. This situation has arisen either because previously complained of noticeless entries have been struck down as not complying with the relevant local statute or have been upheld as both legal and constitutional. (Ker vs California, supra; Sabbath vs United States, 357 U.S. 301; see also, Rodriguez vs Butler, 536 F2d 982 (2d Cir.).)

The existence of a federal, constitutional right is a recurring problem which has so far been avoided in the lower Courts on the same basis as in this Court: statutory illegality or a finding both of legality and constitutionality. (See, for example, Rodriguez vs Butler, supra; United States vs Sokolow, 450 F2d 324 (5th Cir.); United States vs Chapman, 384 F.Supp. 1232 (S.D.Fla); United States vs Sims, 231 F.Supp. 251 (D.Md.); People vs Floyd 26 N.Y. 2d 558, 312 N.Y.S.2d 193).

The lower Courts have tended to assume the existence of a federally protected right against noticeless entry or to point out that its existence remains in question. (See, for example, Rodriguez vs Butler, supra, 536 F2d at 985; United States vs Sims, supra, 231 F.Supp. at 255; People vs Floyd, supra, 26 N.Y.2d at 563, 312 N.Y.S.2d at 1956.)

We respectfully suggest that the right against noticeless entry is too fundamental to be left any longer to conjecture. This Court has noted that:

> The requirement of prior notice of authority and purpose before forcing entry into a home is deeply rooted in our heritage and should not be given grudging application.... Every householder, the good and the bad, the guilty and the innocent, is entitled to the protection designed to secure the common interest against unlawful invasion of the house. (Miller vs United States, supra, 357 U.S. at 313.)

Such deeply "embedded", "traditional fair procedural requirements", as notice of authority and of purposes should not remain consigned to constitutional limbo. (Miller United States, supra, 357 U.S. at 313).

This case is especially appropriate for addressing the issue because the Appellate Division asserted as exigent circumstances the very circumstances that have traditionally called for a heightened awareness of the need to give notice: the possibility that the arrestees might be armed.

This Court, the Court of Appeals of New York (under whose law

the case was decided), and the Supreme Court of Florida (in whose state the entries were made) have all held expressed the view that the traditional requirement of notice is intended to avoid violence particularly where the arrestee is armed. Time and again, this Court and others have cited with approval the concurrence of Mr. Justice Jackson:

> I am the less relectant to reach this conclusion because the method of enforcing the law exemplified by this search is one which not only violates legal rights of defendant but is certain to involve the police in grave trouble if continued. That it did not do so on this occasion was due to luck more than to foresight. Many homeowners in this crimebeset city doubtless are armed. When a woman sees a strange man, in plain clothes, prying up her bedroom window and climbing in, her natural impulse would be to shoot. A plea of justifiable homicide might result awkwardly for enforcing officers. But an officer seeing a gun being drawn on him might shoot first. Under the circumstances of this case, I should not want the task of convincing the jury that it was not murder. I have no reluctance in condemning as unconstitutional a method of law enforcement so reckless and so fraught with danger and discredit to law enforcement agencies themselves. (McDonald vs United States, concurring opn. 335 U.S. 451, 460-1; cited at Sabbath vs United States, supra, 391 U.S. at 589. Miller vs United States, supra, 357 U.S. at 313, w. 12; People vs Floyd, supra, 26 N.Y. 2d at 562, 312 N.Y.S.2d at 195, note; Koptyra vs State, 172 (So 2d 628, 631 (Fla).).

The fact relied on by the Appellate Division that the officers armed themselves against the danger ("In fact, one of the arresting officers had wrapped a towel around his arm prior to the entry for protection against the anticipated attack by this animal. [P.31 , infra.]), does not vitiate the essential nature of the traditional rule in this regard, the Appellate Division ignored even the New York formulation of the common-law rule:

> Nor does the circumstance that the arresting officers drew their guns before entering defendant's room prove anything, especially since they were engaging in the extra hazardous act of entering his room by stealth without notice. (People vs Floyd, supra, 26 N.Y.2d at 563, 312 N.Y.S.2d at 195.)

The requirement of notice assumes the possibility of armed defense by the unsuspecting arrestee. It is just this possibility which the requirement seeks to avoid. The requirement of notice gives the armed arrestee the opportunity to surrender peaceably.

New York Criminal Procedure Law §§120.80 and 140.15 are the embodiment of the common law. (People vs Floyd, supra, 26 N.Y.2d at 562, 312 N.Y.S.2d at 194-5). As such the exceptions in C.P.L. §§120.80(4) and 140.15(4) are not intended to do away with the notice requirement as historically developed, but only to cover situations where the police are under attack or threatened with attack.

In any event, it is appropriate for this Court, should it find a constitutional right of notice to exist, to determine also the limits of that right. This Court should determine if exception to the right, by way of definition of exigent circumstances, may destroy the right itself.

We believe that the argument against such destruction by exception is fully made by the United States District Court for District of Maryland dealing with circumstances strikingly similar to these:

> Lest this Court be thought to have permitted a legalism to prevail over common sense and to have subjected arresting authorities to an unnecessary risk to their lives and safety in the performance of their duty, it is well to restate what is here decided....an arresting officer may not break into a home (here, a hotel room) without prior demand for entry, statement of purpose and refusal of admittance solely on the ground that to demand entry and give notice would result in increased risk of bodily harm to him. This is decided because repeated deliberate decisions over a course of more than three hundred years have concluded that when there is a conflict between these two considerations, the right to privacy in one's own home must prevail over society's interest in punishing the guilty. Here a conflict between these considerations could well have been avoided. Defendant's whereabouts were known to the FBI. No valid reason appears why defendant could not have been arrested going into his hotel room, coming out of his hotel room •

> in a corridor, public room or the elevator of the hotel or outside the hotel. By choosing to make the arrest in the legal equivalent of defendant's home the agents subjected themselves to the necessity of giving notice. Their failure to give notice rendered the arrest illegal. (United States vs Sims, 231 F.Supp. supra , at 257-8).

Finally this Court, if necessary, should exercise the powers asserted by for it by Mr. Justice Clark "to determine whether, notwithstanding its legality under State law, the manner of entering the house ... offend[ed] federal Constitutional standards of reasonableness..." (Ker vs California, supra 374 U.S. at 38.) May the police reasonably rely on their "fears" of a dog who has not barked for 18 hours? May they reasonably rely on their "fears" that an arrestee is armed in the absence of any objective proof that he is or that he has been at any reasonably recent time, if ever?

We respectfully suggest that definition of the constitutional right of notice before entry is a matter that fully warrants the attention of this Court at this time.

> 2.(a) The decision below demonstrates the continuing reluctance of New York Courts to abandon the reasonable suspicion standard of People vs Morales, 22 N.Y.2d 55, reversed sub. nom. Morales vs N.Y., 396 U.S. 102, and to adopt the requisite standard of probable cause; (b) the absence of probable cause in this case is so egregious as to warrant intervention of this Court.

The Appellate Division stated the facts upon which it based a finding of probable cause:

> Before they arrested the defendant, the police officers knew: that Mitton had been the victim of a robbery and murder; that Lucas and another person had been seen near the bank close to the time Mitton was to arrive; that the defendant had recently been fired from the same job Mitton had; that Lucas and the defendant had made plans to leave the area; that although neither Lucas nor the defendant was registered at the Downtowner Motel, Lucas left his car there, rather than at the airport; that the defendant and Lucas were registered in the Florida motel under false addresses; and that Lucas had told a person in the Walden, New York area not to disclose their whereabouts. Thus, the police had done more than merely place Lucas near the bank at about the time of the roobery. Indeed, the police had reason to conclude that Lucas and Graham had fled the area. (P.30-1, infra.)*

It is respectfully submitted that even as to Lucas these facts give rise only to a suspicion. As to petitioner they surely give nothing more.

The Appellate Division reached its conclusion without citation of authority (except as to flight) and without analyzing the facts.

Its decision and the refusal of the New York Court of Appeals to hear the case represent a continuing tendency on the part of the New York Courts to apply the reasonable suspicion standard ennunciated in People vs Morales, 22 N.Y.2d 55, reversed sub nom, Morales vs New York, 396 U.S.102, notwithstanding this Court's decision in Dunaway vs State of New York, U.S. 99 S.Ct. 2248,

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* The finding that Lucas gave a false address is totally unsupported in the record. He gave his correct address, not only at the motel, but at the car rental agencies and at Western Union. (R/A 284, 394; Suppression Ex's 49, 50, 54.)

60 L Ed 2d 824. (Cf. People vs Bryant, ___A.D.2d ___, 418 N.Y.S.2d 619 and People vs Vese, ___ Misc 2d ___, 417 N.Y.S. 2d 1015.)

The New York Courts resisted the probable cause standard during the ten years between Morales vs New York and Dunaway vs State of New York. (See for example, People vs Morales, 42 N.Y. N.Y. 2d, 129, 135, cert. den. 434 U.S. 1018; People vs Wise, 46 N.Y. 2d 321; People vs Liberty, 67 AD2d 776 (3rd Dept.); People vs Boyer, 65 A.D.2d 840 (3rd Dept.).)

The decision below represents a continuing application of the Morales reasonableness standard without invoking it by name. Particularly, it continues the use of facts placing the arrestee near the scene of the crime as justification for the police conduct. (See People vs Morales, supra, 42 N.Y.2d at 134-5; People vs Wise, 46 N.Y.2d 321, 330.)

Petitioner's sole alleged connection with the crime itself is that his friend Lucas was seen at the bank, which Mitton may or may not have arrived at, at least 40 minutes before Mitton would have arrived there. Peculiarly enough, the New York Court of Appeals in Morales recognized that placing "the defendant in the vicinity of the crime" even "at the time of the murder" does not constitute probable cause (People vs Morales, supra, 42 N.Y. 2d at 135.)

A finding of probable cause in this case so violates the standards ennunciated by this Court to warrant granting this petition, even if the decision below is not part of a pattern of reluctance.

The facts at best warranted the police in seeking to question Petitioner, certainly not in arresting him.

Viewed objectively and without hindsight there is nothing in the facts which justifies a finding of probable cause. (Beck vs Ohio, 379 U.S. 89, 91; Rios vs United States 364 U.S. 253, 261-2)

Lucas's presence near the bank, even when combined with the other meager facts, did not give probable cause to believe he had later waylaid Mitton, transported him 35 miles, robbed him and

murdered him. (United States vs DiRe, 332 U.S.581; People vs Morales, supra, 42 N.Y. 2d at 135.)

Nor can petitioner's alleged "flight" be considered as affording probable cause. Viewed objectively, the trip to Florida was equally nothing more than a vacation jaunt by two married men with women other than their wives.

Petitioner's arrest was based solely on suspicion based on conduct that is equally innocent as guilty, and at worst equivocal. Such conduct does not give rise to probable cause. (Henry vs United States, 361 U.S. 98; Taylor vs United States, 286 U.S.1).

The intrusion into petitioner's life was of the highest nature: he was placed under arrest and the arrest was made by warrantless entry into his locked bedroom while he was known to be sleeping. Such an intrusion requires the highest predicate for police intrusion. (Terry vs Ohio, 392 U.S.1; see also Stoner vs California, 376 U.S. 483; McDonald vs United States, 335 U.S. 451; United States vs Jeffers, 342 U.S. 48, Johnson vs United States, 333 U.S.10.)

> 3. This case was decided on the authority of People vs Payton and Paddick, 45 N.Y. 2d 300. This Court should grant certiorari herein in order to be able to dispose of this case in light of its decision to be rendered in Payton and Riddick.

The Appellate Division firmly placed its decision herein on the rule of Payton and Riddick:

> Nonetheless, in New York a warrantless entry to make a felony arrest, if based on probable cause, is permissible. (People vs Payton, 45 N.Y.2d 300...) (Page 30, infra)

Payton has been twice argued before this Court and decision can be expected at this term.

Should this Court reverse, petitioner would clearly be entitled

to reversal since the Appellate Division did not find that exigent circumstances existed.

However, should Payton be affirmed, this case still raises issues of definition of the extent to which warrantless entry can be made which warrant the attention of this Court.

a) Should Payton be affirmed, such affirmance would include the heightened indentification found in both Payton and Riddick.

In Payton, "two eyewitnesses to the crime -- both of whom had known defendant -- identified him to the police as the killer. One of the witnesses also furnished the defendant's address." (People vs Payton and Riddick, supra, 45 N.Y.2d at 305.)

In Riddick, "the victims had identified defendant from a photograph as the perpetrator of the robberies." (People vs Payton and Riddick, supra, 45 N.Y.2d at 307.)

No such direct, eyewitness identification is present here. Petitioner was arrested on weak circumstantial evidence which if it constitutes probable cause, bearly does so. This case gives this Court the opportunity to delineate the nature of the proof of identity necessary to justify a Payton arrest, should that case be affirmed.

b) Payton did not justify all warrantless home arrests. The Court itself pointed out "the specially alarming quality of night-time entries." (People vs Payton and Riddick, supra, 45 N.Y.2d at 311)

Should Payton be affirmed, this case will give this Court the opportunity to delineate the circumstances under which a Payton warrantless arrest can be made, particularly in regard to arrest which "gives the appearance of having been calculated to cause surprise, fright, and confusion" and succeeded in doing so. (Brown vs Illinois, 422 U.S. 590, 605.)

c) Should the Court affirm Payton, this case will give this Court the opportunity to determine the effect of delay and the general passage of time on warrantless Payton arrests.

The arrests were made four days after the investigation focused on Graham and Lucas; two days after the police determined Graham and Lucas had gone to Fort Lauderdale; 32 hours after the New York Police arrived in Florida; at least 20 hours after the police located the motel room; and two hours after the four suspects returned to the motel and went to sleep. The time lapse alone belies exigency. The recent words of Chief Justice Burger apply almost verbatim to this case:

> ... It may be useful to note that the factual setting of this case provides what seem to me, a classic illustration of the dividing line between an impermissible, warrantless entry and one permissible under the "exigent circumstance" exception to the Fourth Amendment warrant requirement.
>
> ...the IRS agents assigned to the investigation of the fugitive Norman's tax liability placed the premises under 24-hour surveillance. One night during the course of this surveillance, the agents observed cartons and other materials being removed from the premises by persons unknown to them. Against the background facts, such surreptitious nighttime activity constituted an exigent circumstance that would have justified an immediate seizure of the materials being moved in order to protect the interest of the United States. This is especially so since here the premises were controlled by the alter ego of an individual who was not a delinquent taxpayer, but who was, at the time, a fugitive from justice. Rather than acting immediately, however, the agents chose to wait for approximately a day and a half of two days before making their entry. I agree with the conclusion that there were no exigent circumstances on these facts; however, the Court holds no more than that the agents' delay after observing these highly suspicious events makes that exception to the warrant requirement unavailable to them. By failing to act at once, the exigency was dissipated .... (G.M.Leasing Corp vs. United States, U.S. , 97 S. Ct. 619, 663).

Any justification for a warrantless Payton arrest would surely have been lost by the leisurely pace the police set themselves, which gave more than adequate time to obtain a warrant.

4. The Appellate Division concedes that the motel search violated the rule of Chimel vs California, 395 U.S. 752, but justifies the search and receipt of the items seized into evidence on the basis of the confession which followed and is a product of the search. Such a ruling violates fundamental rulings of this Court and warrants the corrective review of this Court.

The Appellate Division assumes that the motel search was improper but holds that "in light of the overwhelming case against him once his confession had been admitted, and the faint prejudicial impact of the fruits of the improper search, the error must be considered harmless (see People v Crimmins, 36 N.Y.2d 230, 240-241...)" (P.31, infra)

(Interestingly enough, this is an incorrect statement of the New York rule. By citing to Crimmins at 36 N.Y.2d at 240-241, the Appellate Division applied the Crimmins rule for non-constitutional error rule which requires reversal unless "there is no reasonable possibility that the error might have contributed to defendant's conviction and that it was thus harmless beyond a reasonable doubt". (People vs Crimmins, supra, 36 N.Y.2d at 237.).)

There was a serious trial issue, especially in light of Dr. Gross's testimony that the shooting took place after 1:00 a.m. on October 14, 1975, when petitioner was already in New Jersey. Surely, the safe deposit keys and other evidence seized in the motel search contributed to the jury's rejection of Dr. Gross's testimony. Other evidence such as the safe deposit box and the money, were obtained from leads given by the illegally seized evidence, (Nardone vs United States, 308 U.S. 338.) The receipt of this evidence was not harmless beyond a reasonable doubt and Appellate Division did not even find it to be so. (Chapman vs California, 386 U.S. 18, 21-4; Fahy vs Connecticut, 375 U.S. 85, 91-2)

The Appellate Division justified the search on the basis of the confession which was, at least in part, the product of the search. The Court may not so support an unconstitutional search. The justifying confession is itself the poisonous fruit of the tree. (Wong Sun vs United States, 371 U.S. 471)

Such misconceptions justify review by this Court not only to correct the situation in this case but to remind the Courts that their view of a defendant's guilt cannot be determinative of the constitutional issues before them.

5. This Court should review the decision below because the Appellate Division refused to suppress the fruits of a general search in violation of principles long and clearly enunciated by this Court.

The police seized everything in the two rooms except the dog cage. They searched drawers, suitcases, closets, and medicine cabinets.

Whether viewed as a proper warrantless search or as a search incident to an arrest, the search was unconstitutional.

General searches, with or without a warrant, are unconstitutional:

> General searches have long been deemed to violate fundamental rights. It is plain that the Amendment forbids them. (Marron vs United States, 275 US 192, 195; see also Stanford vs Texas 379 US 476)

Since a warrantless search is an exception to the Fourth Amendment warrant requirement, no greater rights are acquired by the police in a warrantless search. Warrantless, general searches are equally abhorrent as general warrants conducted under warrants:

> General or exploratory searches are condemned even when they are incident to a lawful arrest. (Amador-Gonzalez vs United States, 391 F2d 308, 313. See also United States vs Bravo, 403 F.Supp. 297, 302-3)

Indeed, limitation of searches is one of the two main reasons for requiring a warrant in the first place. (Coolidge vs New Hampshire, 403 US 443, 467.)

The seizures in this case fall clearly within those prohibited by this Court in Kremen vs United States, 353 U.S. 346.

Both the police and the Courts appear to require reminder by this Court that the right to search and seize is a delimited one.

> 6. The decision below gives this Court an opportunity to reaffirm a principle so basic that it is rarely stated and oft forgotten; that truthfulness is not an element of voluntariness.

The County Court considered the truthfulness of the confession as a factor in his determination of voluntariness:

> THE COURT: It appears to me the truth and accuracy of a statement would have a bearing upon its voluntariness. (R/A 732)
>
> THE COURT: I think the truthfulness and accuracy of his confession has a bearing upon its voluntariness. It certainly has to me. (R/A 733)
>
> THE COURT: It's a matter of common experience and knowledge, Mr. Zager. If a man's words are twisted, and the details being given of some event, and if it's being done under some compulsion, that he might give details which are altogether different from the truth. If he is, on the other hand, making a voluntary statement of his own free will and without any violation of any of his constitutional rights, and in the desire to cooperate, there is a likelihood his statement would be more truthful. I think that the accuracy or truthfulness of a statement that is given has a bearing upon the issue as to whether or not it was voluntarily given. That is the only reason I'm taking it. (R/A 739)
>
> THE COURT: I will overrule the objection on two grounds. ...secondly, it relates to the truthfulness of the confession. I believe it would have some bearing upon the issue which I have to decide, which is its voluntariness. (R/A 823)
>
> THE COURT: The Court is saying, and I'm saying and I think I have said it very clearly, that the truthfulness of the confession would have a bearing. It's not determinative, not dispositive of the issue, but would have a relationship or bearing upon the question that the Court has to determine. (R/A 826)

These rulings, as affirmed, violate fundamental principles of the privilege against self-incrimination. They put defendant to the test, of proving his confession to be false, when that is not properly a factor.

This Court has clearly rejected the criterion of truthfulness, yet the trial Court repeatedly asserted truthfulness as a factor in his determination.

Fundamentally, the privilege against self-incrinination assumes the truthfulness of the confession, but asserts the society's higher value in freedom from coercion:

> Our decisions under that Amendment[14th] have made clear that convictions following the admission into evidence of confessions which are involuntary...cannot stand. This is so not because such confessions are likely to be untrue but because the methods used to extract them offend an underlying principle in the enforcement of our criminal law... (Rogers vs Richmond, 365 U.S. 534, 540-1.)
>
> From a fair reading of these expressions, we cannot but conclude that the question whether Roger's confessions were admissible into evidence was answered by reference to a legal standard which took into account the circumstances of probable truth or falsity. And this is not a permissible standard under the Due Process Clause of the Fourteenth Amendment. The attention of the Trial judge should have been focused, for purposes of the Federal Constitution, on the question whether the behavior of the State's law enforcement officials was such as to overbear petitioner's will to resist and bring about confessions not freely self-determined -- a question to be answered with complete disregard of whether or not petitioner in fact spoke the truth. (Rogers vs Richmond, supra, 365 U.S. at 543-4) (emphasis supplied)

The use of the incorrect truthfulness standard should have resulted in reversal of the finding that the confession was voluntary:

> We are barred from speculating--it would be an irrational process -- about the weight attributed to the impermissible consideration of truth and falsity which, entering into the Connecticut trial court's deliberations concerning the admissibility of the confessions, may well have distorted by putting in improper perspective, even its findings of historical fact. Any consideration of this "reliability" element was constitutionally precluded, precisely because the force which it carried with the trial judge cannot be known, (Rogers vs Richmond, supra, 545) (Emphasis supplied)

In light of the fundamental misconception of the privilege by the Courts below, it is proper that the Court reaffirm the irrelevance of truthfulness to a determination of voluntariness.

> 7. This Court should review this case because the Courts below have failed to follow the mandates of this Court concerning multiple searches.

The Courts below did not resolve the question of whether the second search of the Lincoln on October 20, 1975, was warrantless or not. In either event the search was conducted in violation of the mandates of this Court.

The October 20, 1975, search cannot be justified under the warrant of October 17, 1975, which had been fully and thoroughly executed.

A search warrant authorizes only one search; it does not allow the police two bites of the apple. The Fourth Amendment prohibits "a series of intrusions, searches, and seizures pursuant to a single showing of probable cause." (Berger vs New York, 388 U.S. 41, 59.)

Beyond that statement, the rule appears to have been developed in the lower courts. (Mellet & Nichols Brewing Co. vs United States, 296 Fed.765, 768-9; United States vs American Brewing Co.296 Fed.772, 777-8; Coburn vs State, 78 Okl. Cr. 362, 148, P.2d 483, 484; Duncan vs State, 11 Okl Cr. 217, 144 P.629, 632; State vs Moran, 103 W.Va. 753, 138 S.E. 366, 368; State vs Pina, 383 p. 2d 167, 168-9; McDaniel vs State, 197 Ind. 179, 150 N.E.50;

State vs Parsons, 83 N.J. Super. 430, 200 A2d 340, 350.)

Viewed as warrantless, the search of October 20, 1975, was equally unconstitutional. (Vincey vs Arizona, __U.S.__, 98 S. Ct. 2408; Coolidge vs New Hampshire, 403 U.S. 443, 458-64; cf Caldwell vs Lewis, 417 U.S. 583).

This case especially gives the Court the opportunity to distinguish between surveillance and seizure of a motor vehicle.

The police had the car under surrveillance from October 17 to October 21. They searched the car on October 17 and on October 20, seizing and carrying away most of the evidence.

On October 21, without a new warrant, they seized the car itself. We believe that it is proper for this Court to determine if such a seizure, independent of the searches, is proper.

> 8. We urge that this Court should review this case because the lower Courts were so enthralled by defendant's confession that the entire proceedings were distorted so that constitutional issues were decided in general in violation of existing principles denying petitioner a fair hearing.

It is respectfully suggested that the constitutional issues herein were resolved not on their merit but on the strength of the Court's overwhelming belief in petitioner's guilt , thus denying petitioner a fair hearing on the issues.

This Court, both to protect the rights of petitioner and to remind Courts of the independence of guilt and denial of constitutional rights, should review this case. Petitioner should be entitled to have constitutional issues decided dispassionately on constitutional principles.

CONCLUSION

For the reasons stated herein, the petition for a writ of certiorari should be granted.

Dated : February 28, 1980

STEPHEN L. OPPENHEIM
Attorney for Petitioner

STATE OF NEW YORK SUPREME COURT

APPELLATE DIVISION THIRD DEPARTMENT

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

- against -

RICHARD B. GRAHAM,

Appellant.

Argued, June 4, 1979.

Before:

HON. A. FRANKLIN MAHONEY,
Presiding Justice,
HON. MICHAEL E. SWEENEY,
HON. T. PAUL KANE,
HON. J. CLARENCE HERLIHY,
Associate Justices.

APPEAL from a judgment of the County Court of Sullivan County (Louis B. Scheinman, J.), rendered November 3, 1977, upon a verdict convicting defendant of two counts of murder in the second degree, one intentional and the other felony murder, kidnapping in the first degree, and robbery in the first degree.

STEPHEN L. OPPENHEIM, for appellant, 253 Broadway, Monticello, New York 12701.

STEPHEN LUNGEN, as Special Prosecutor, 6 N. Main Street, Liberty, New York 12754.

OPINION FOR MODIFICATION

Exhibit "A"

MAHONEY, P.J.

A complete recitation of the facts can be found in the reported decision on the defendant's pre-trial suppression motion (People v. Graham, 90 Misc 2d 1019). Briefly, Craig R. Mitton, who collected daily revenues from service stations for his employer, Mid-Valley Petroleum Corporation of Newburgh, New York, disappeared after leaving company offices late in the afternoon of October 13, 1975 to make a deposit. His body, bearing three bullet wounds and marks of a blow to the head, was discovered in Sullivan County two days later. Over $25,000 in collections were missing. By the evening of October 18, the police had learned that the defendant, Lucas and two women were registered in rooms 307 and 308 of the Airport Travel Motor Lodge in Dania, Florida. The rooms were empty when the police arrived and surveillance was continued throughout that night. At approximately 6:00 A.M. the next morning, the defendant and his party returned to their rooms. Due to a misunderstanding in communications with State Police headquarters in Middletown, New York, the State Police officers assisting the Broward County Sheriff's office in the investigation and arrest believed that a warrant had been issued for defendant's arrest at 7:00 P.M., October 18, in New York. Therefore, at 8:00 A.M., on October 19, the police entered the motel rooms and arrested the defendant. Only later did the police learn that the warrant had in fact not yet been issued.

After his arrest, defendant gave a full confession to the police. This confession was so detailed and consistent with the facts which the police had independently uncovered as to constitute overwhelming proof of guilt. The defendant's briefs, if a production which numbered over 300 pages can still be called brief (see Slater v. Gallman, 38 N.Y 2d 1, 5), when reduced to their significant arguments, essentially challenge the admissibility of the confession in light of an allegedly defective arrest procedure under

the Federal Constitution and Florida law. Of course, if the arrest was defective the subsequent confession could not be admitted because the connection between the arrest and the inculpatory statement had not yet become so attenuated as to dissipate the taint (Brown v. Illinois, 422 U.S. 590; People v. Stewart, 41 N Y 2d 65). But we find no error in the arrest procedure.

A warrantless arrest is authorized under New York law (CPL 140.05, 140.10) and Florida law (Fla. Stat., § 901.15). Such an arrest may be made where the arresting officer has probable cause to believe that the person to be arrested has committed a felony. As yet, the United States Supreme Court has not prohibited warrantless arrests following entry into a suspect's home even in the absence of exigent circumstances (United States v. Watson, 423 U.S. 411, 418, n. 6). Therefore, the legality of the arrest in this case turns on state law.

A motel room is entitled to the same protection under the Fourth Amendment as the home (People v. Wood, 31 N Y 2d 975). Nonetheless, in New York a warrantless entry to make a felony arrest, if based upon probable cause, is permissible (People v. Payton, 45 N Y 2d 300, oral arg. before U.S. Sup. Ct. March 26, 1979 [47 U.S. Law Wk. 3651]). The same result obtains under Florida law (State v. Perez, 277 So 2d 778 [Fla.], cert. den. 414 U.S. 1064; West v. State, 355 So 2d 489 [Fla. App.]). Thus, despite defendant's contention otherwise, this case presents no choice of law issue. Once probable cause is established, the arrest procedure employed against defendant is valid.

On the facts before us, we find sufficient probable cause to justify the arrest. Before they arrested the defendant, the police officers knew: that Mitton had been the victim of a robbery and murder; that Lucas and another person had been seen near the bank close to the time Mitton was to arrive; that the defendant had recently been fired from the same job Mitton had; that Lucas and the defendant had made plans to leave the area; that although neither Lucas nor the defendant was registered at the Downtowner Motel, Lucas left his car there, rather than at the airport; that the defendant and Lucas were registered in the Florida motel under false addresses; and that Lucas had told a person in the Walden, New York area not to disclose their whereabouts. Thus, the police had done more than merely place Lucas near the bank at about the time of the robbery. Indeed, the police had reason to conclude that Lucas and

the defendant had fled the area. Flight is an important element in establishing probable cause (see Peters v. New York, 392 U.S. 40, 66; People v. Kreichman, 37 N Y 2d 693, 699).

Defendant also challenges the arrest because the police did not give notice of their authority prior to entry. Both New York and Florida, however, permit noticeless entry for the purpose of making an arrest when the safety of the arresting officers might otherwise be endangered (see CPL 120.80, subd. 4; 140.15, subd. 4; Fla. Stat. §§ 901.17, 901.19, subd. [1]). See also Benfield v. State, 150 So. 2d 536 [Fla. App.]). At the time of the arrest, the police knew that the defendant and his companions had taken a Doberman Pinscher with them to Florida. In fact, one of the arresting officers had wrapped a towel around his arm prior to the entry for protection against the anticipated attack by this animal. Furthermore, it was reasonable for the police to believe that defendant, a fugitive from a homicide in which the murder gun was still missing, might be armed. Therefore, defendant's objection to the noticeless entry is without merit.

Assuming the warrantless search of defendant's motel room conducted after his arrest was improper (see Chimel v. California, 395 U.S. 752; People v. Evans, 43 N Y 2d 160, 165), in light of the overwhelming case against him once his confession had been admitted, and the faint prejudicial impact of the fruits of the improper search, the error must be considered harmless (see People v. Crimmins, 36 N Y 2d 230, 240-241; cf. People v. Grant, 45 N Y 2d 366, 378-379). Defendant also maintains that items seized from Lucas' vehicle should have been suppressed because the warrant was defective. Even if defendant had standing to make such a challenge (see Rakas v. Illinois, ___U.S. ___, 99 S. Ct. 421), the warrant issued for the search of Lucas' Lincoln Continental in New Jersey was not fatally vague. It authorized a search for "other evidence of a homicide" and because it so limited the scope of the search to one particular crime it cannot be considered an unconstitutional general warrant (see Andresen v. Maryland, 427 U.S. 463. See also Lo-Ji Sales, Inc. v. State of New York, ___ U.S. ___ [June 11, 1979]). Therefore, this evidence was properly admitted.

Defendant's remaining complaints of illegal police activity are not persuasive. However, two issues affecting sentencing remain. Defendant asserts that since he was convicted of felony murder, the kidnapping and robbery charges should have been dismissed as lesser included offenses. Since participation in one of the enumerated predicate felonies (see Penal Law § 125.25, subd. 3)-is a requisite

of the crime of felony murder, if the defendant is convicted of felony murder, the predicate felony charge must be dismissed (People v. DeGata, 64 A D 2d 9, lv. to app. den. 45 N Y 2d 841; People v. Forbes, 60 A D 2d 654; cf. People v. Shuman, 37 N Y 2d 302, 305. But see People v. Nichols, 230 N. Y. 221, 225-226, cf. People v. Perez, 45 N Y 2d 204). In addition, the kidnapping charge merged with the robbery since the abduction did not exceed 12 hours before the victim Mitton died, and because it was incidental to and inseparable from the crime of robbery (see People v. Smith, 47 N Y 2d 83; People v. Cassidy, 40 N Y 2d 763). Mitton was only abducted in order to get the money he was carrying. Therefore, since the kidnapping charge merged into robbery, only one predicate felony survived and it must be considered included in the felony murder conviction. The judgments imposed for conviction of kidnapping in the first degree and robbery in the first degree must necessarily be vacated.

The judgment should be modified, on the law and the facts, by reversing the convictions of kidnapping in the first degree and robbery in the first degree and dismissing the counts of the indictment therefor, and, as so modified, affirmed.

STATE OF NEW YORK

COUNTY COURT : COUNTY OF SULLIVAN

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THE PEOPLE OF THE STATE OF NEW YORK

-against- OPINION

RICHARD B. GRAHAM
RICHARD P. LUCAS,

Defendants.

----------x

APPEARANCES:

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Attorney for Defendant Richard P. Lucas

SCHUSSLER, J.

These are motions by defendants to suppress certain tangible evidence seized pursuant to search warrants and also a warrantless arrest, and to suppress certain confessions or admissions.

The indictment charges defendants with the crimes of murder in the second degree, kidnapping and robbery.

Although the cases have been severed for trial, these hearings were combined and held jointly, pursuant to stipulation.

This opinion will set forth the facts found by this Court in making its determination (C.P.L. 710.60 subd. 4). Although different standards of proof are required on the several types of suppression sought (Peo. v. Pobliner, 32 N.Y. 2d 356, clear and convincing evidence test on motion to suppress evidence other than a confession, and Peo. v. Huntley, 15 N.Y. 2d 72, beyond a reasonable doubt test as to voluntariness of a confession), this Court has found all facts mentioned beyond a reasonable doubt.

At about midnight of October 13, 1975, one Craig R. Mitton was reported missing by his wife. It was learned by the New York State Police that he had been employed by the Mid-Valley Petroleum Corporation of Newburgh, New York, as a route sales supervisor, whose duties included collecting money from gas stations operated by his employer and depositing same each afternoon at about 4:00 P.M. in a night depository at a certain local branch bank.

The police learned from company officials that on said date of October 13 he had made up the deposit, which included cash in four bags, and left for the nearby bank at a time which was between 4:00 o'clock, and 4:45 o'clock

P.M. on that date. He was not seen or heard from thereafter, and the said deposit in excess of $25,600 had not been made.

On October 15, 1975, his body was found in Sullivan County, with clear evidence that he had been the victim of foul play, his body evidencing 3 bullet holes, 2 in the head and 1 in the back, and a blow to his head.

The vehicle used by the deceased, which belonged to his employer, was found abandoned in another location, with a change box.

The police learned from one Gloria Baker, who personally knew defendant Lucas, that at about 4 o'clock P.M. on October 13, she had seen defendant Lucas sitting in a Lincoln automobile with another unidentified person at the branch bank where the deceased was to have made the deposit. Gloria Baker also advised the police that defendant Lucas had cohabited for a time with one Madeline Mead, employed at the Middlehope Service Station, and that defendant Graham had also been employed at said service station. The police also learned from a Julia Tibby, that her sister, Sherryl Kilb had gone on a small vacation with defendant Lucas, another girl, Birdie, and another fellow, "Richie".

The police also learned from company officials that defendant Graham had held the same position with Mid-Valley Petroleum Corporation as the deceased, but had been fired about 2 weeks earlier for taking home a deposit of approximately $30,000 without depositing same in the night depository at the same bank branch.

Julia Tibby had also told the police that Graham

possessed a handgun. Further inquiry disclosed that he had no permit for same.

The police were also advised that defendant Graham wore a gun holster on his person.

The police also learned that the defendants were friends, and that they and the girls Sherryl Kilb and Roberta Graham had left the area in the evening or night of October 13.

One Georgia Shorey had also advised the police that Lucas, Sherryl Kilb, Graham and one Roberta Holmes were together in the New York City area, and that Georgia Shorey had a money-gram waiting for her at the Newburgh Western Union office, subsequently learned to be in the sum of $100, from one of the defendants in Florida.

Gloria Baker had also advised the police that about a week earlier, Lucas had called her to obtain the keys to the safe at the Middlehope Service Station, as he was in need of money and that no one would be hurt. She refused, and subsequently she received a telephone call from Lucas telling her that if she told anyone of their conversation he would shoot her. On that same evening the said gas station was burglarized and money and cigarettes stolen.

Subsequently, the police learned that Georgia Shorey received a telephone call from Lucas advising her not to reveal the whereabouts of the two defendants and the girls to anyone.

The police launched a search for defendants and checked airports in the New York metropolitan area and located the

1974 Lincoln at the Gateway Motel in Newark, New Jersey, near Newark Airport, during the early morning hours of October 17.

The Motor Vehicle Bureau confirmed that the car belonged to Lucas. A bartender at the motel identified a photograph of Lucas, and advised the police that he had been tipped with a paper bag containing about $8.00 in change, there having been change missing from the change box found in the company car driven by the deceased victim.

The police also learned that defendant Lucas had an extensive arrest record with one or two convictions. The crimes contained on his record included crimes of violence and the use of firearms.

A check made with the Motor Vehicle Bureau revealed that the Lincoln automobile owned by Lucas was a 1974 model, and its license plates number, which matched the plates on the car.

Following the location of the automobile, the same was placed under discreet surveillance by the New York State Police, and that afternoon other New York officers arrived. Subsequently, at about 4:00 P.M. on the 17th, Investigators Chandler and Ovens, together with a member of the local prosecutor's office, appeared before a Superior Court judge of the State of New Jersey and gave testimony under oath before said judge in their application for a search warrant of the automobile. A transcript of said proceedings was received in evidence, showing that there was preliminarily a discussion with the Court, after which the Court placed the oral application on the record, the Court capsulizing or summarizing

the facts giving rise to probable cause on the record.

An issue was raised at the hearing as to whether the officers were sworn during the recorded phase of the record, which contains most of the facts abovementioned, or, as Investigator Chandler testified, when the initial discussion with the Court commenced off the record. Defense counsel were given the opportunity to confer with the New Jersey Court, and to call the judge as a witness to controvert the testimony of Investigator Chandler. Although one of the defendant's attorneys conferred with said judge, he was not called.

This Court finds beyond a reasonable doubt that all of the foregoing facts were laid before the New Jersey Court, under oath, which, in the transcript in evidence held "I am satisfied that there is probable cause to believe that a crime has been committed and that there is probable cause to believe that the automobile sought to be searched and seized has been sufficiently established as the connecting link between the commission of the homicide and evidence of the crime," and signed the search warrant (People's Exhibit 24A, p.11).

A search of the car was then conducted by a New Jersey police officer with 2 New York State Police officers in attendance and assisting.

It should be noted, parenthetically, that the reason the application for the search warrant was made by sworn testimony rather than by affidavit is recited in the New Jersey transcript in evidence, i.e., that the application was made on a Friday, at about 4:00 o'clock P.M., and that there was, therefore, insufficient

time to prepare papers for the Newark prosecutor's office and the probable unavailability of a judge on the weekend.

The search of the Lucas' vehicle yielded miscellaneous papers belonging to defendants Graham and Lucas and a Debra Kilb, a rope, a rifle, shotgun shells, a hair from the trunk area, and other items of property.

All items of personal property found in the car, and the car itself, were inventoried and, with the approval of the New Jersey Court, removed to New York State Police headquarters in New York.

A check with the airlines in Newark revealed that a "Mr. and Mrs. Richard Lucas" and a "Mr. and Mrs. Richard Graham" had departed on a 9:05 P.M. flight from Newark to Fort Lauderdale, Florida, on October 14. The police also learned that defendants had a Doberman Pincer dog with them.

A number of New York State Police officers flew to Fort Lauderdale on the night of October 17. The following day, October 18, the police learned from the Western Union office in Florida from which money-grams had been sent to the Newburgh, N.Y. area the address of a motel in Dania, Florida, which defendants had given to Western Union. It was further learned that Lucas and Graham had sent an additional money-gram each to the Newburgh, N.Y. area.

It was also learned that defendants had registered at this motel under their own names in 2 rooms, but had given false addresses, and had also rented a car and motorcycle, that they had

a large amount of money with them in travelers checks.

On the 18th, the New York State Police officers met with officers of the Broward County Sheriff's department and a member of the Florida Division of Law Enforcement, filled them in on all of the foregoing facts, including those earlier mentioned herein in dealing with probable cause for the automobile search warrant obtained in New Jersey, and a surveillance was maintained of the 2 motel rooms occupied by defendants.

The Florida police requested a teletype message from New York, describing defendants as fugitives. The New York police made such request by telephone, and also for an arrest warrant to be obtained in New York. The teletype message directing the arrest was received in Florida before 8:00 P.M. on the 18th. However, it appears that although the officer in charge of the investigation in New York requested that an arrest warrant be obtained here, the same was not obtained until October 20. However, the officers believed that the warrant had been obtained and was in existence prior to the arrests.

Defendants and the 2 women with them returned to the motel rooms at 6:00 A.M. on the 19th. Believing them to be armed and with a vicious dog, the police waited until 8:00 A.M. when without warning or notice, the police officers simultaneously, with the use of a passkey to one room, and through an unlocked door to an adjoining room, entered both rooms with drawn guns and one officer with a towel wrapped around his arm as a precaution against the dog, and arrested the defendants, who, together with the 2 women, were taken to the Sheriff's Department in Fort Lauderdale, where they

arrived at 9:00 A.M. There was no dog in the room, it having been placed with a veterinarian a day or 2 earlier, nor any guns found.

Defendant Graham was given his full "Miranda" warnings 4 times, once in the motel room, upon arrival at the Sheriff's Department, before making his confession, and at the beginning of his confession, which was tape recorded. On 2 occasions, at 9:00 o'clock and 11:00 A.M., he signed written acknowledgments of having received these warnings and, specifically waived counsel, as he also did orally at the commencement of his tape recorded confession.

A typewritten transcript of Graham's confession was received in evidence at the hearing, (which Graham subsequently refused to sign) and this Court listened, in camera, to the tape recording of the confession (by stipulation). This Court is satisfied beyond a reasonable doubt that Graham knowingly, intelligently and voluntarily waived his right to remain silent and to counsel.

The confession, which took 45 minutes to tape, was completed orally at 11:45 (the same day as the arrest) and in brief substance sets forth the following:

Lucas, who was his friend and drinking companion, and familiar with handling of the moneys at Mid-Valley Petroleum, suggested the robbery of Craig Mitton to Graham who agreed to participate. On October 13, they waited for the victim at the branch bank, held him up, Lucas ordering Mitton into Lucas' car, Graham following in Mitton's station wagon. They drove to a lonely country area where they abandoned Mitton's car, ordering Mitton into the

trunk of the Lincoln. They then drove to another isolated area, Lucas and Graham discussing the fact that Mitton knew Graham as co-employees of Mid-Valley, Lucas insisting, therefore, that they had to "blow him away". When the car was stopped, Graham opened the trunk, Mitton was ordered out, Graham hit him over the head knocking him down with a club, and while Mitton was on the ground, Lucas shot him in the head and back area several times until his gun jammed, and then left the body of the victim there, left the murder scene, picked up the 2 women, disposed of the handgun used in the killing in a stream in New Jersey, etc. He told of taking the money, about $26,000, including change from the change box, he and Lucas placing most of the money in safety deposit boxes in 2 banks in Newark, purchasing travelers checks, and leaving for Florida. He exonerated the 2 women from any implication in or knowledge of said crimes.

Lucas refused to make any statements to the police.

On Oct. 21, both men were taken before a Court in Florida, and waived extradition to New York, Lucas after conferring with counsel which he had requested.

It should be mentioned here that Graham testified in his own behalf at the hearing, and claimed that he had been beaten by an officer Reidy of the New York State Police about 10:00 A.M. while in the Sheriff's office in Florida and his confession thus coerced. This Court is convinced that said claim is a pure fabrication, as Investigator Reidy had little or no contact with him subsequent to the arrest and prior to the confession, Reidy having remained at the motel after the arrests and removal of defendants assisting Florida Police in inventorying the property found there.

Also, Graham claimed marks on his torso from the alleged beating, having evidently forgotten when he testified that when processed at the N.Y. State Police barracks upon his return he had been photographed, front and rear, with absolutely no evidence of same, nor had he complained of any mistreatment to any other police officer nor to the Florida Court when he was brought before said court.

The hearings also covered an inculpatory statement made by Lucas on the airplane trip back to New York. It is clear, even from the testimony of Lucas at the hearing, that he was not mistreated in any way, and that his remarks to the police officer seated next to him on the airplane were voluntary, unsolicited, and after being warned before he spoke that his statement could be used against him. Nor was such statement the result of any interrogation. Lucas merely denied making the statement, and whether he did or did not would be for a trial jury to decide.

An issue developed regarding a cowboy type hat worn by Lucas. This hat had been returned to Lucas in Florida, and he wore it on the trip back to New York. However, after processing at the state police barracks, he inadvertently left it there. The police, then realizing it had evidentiary value, kept it as evidence. Lucas also seeks its suppression.

Based upon the Graham confession and its mention of the hiding of the money proceeds in safety deposit boxes in Newark, the police obtained the names of the banks and the numbers of the accounts, and applied by written sworn applications to the same New Jersey court for search warrants on these 2 banks and respective safety deposit boxes, obtained the search warrants, and searched and

seized the boxes and bank records pursuant thereto.

Returns on all search warrants were duly furnished to the New Jersey Court, and upon order of said Court, all seized property was returned to New York State (including the car and its contents).

Lucas's safety deposit box yielded $10,342.00. Graham's safety deposit box yielded $10,893.00.

It should be noted here that defendants called Roberta Holmes and Sherryl Kilb as their witnesses. The women testified that they were taken also to the Sheriff's Department in Florida, were given Miranda warnings and both made statements to the police. They were well treated, taken back to the motel, the police making the arrangements for their return to New York and transportation to their respective homes. Graham had given Roberta Holmes the keys to the safety deposit box which she kept in her purse, and she had no objection to the police taking the keys. These keys were of the safety deposit box rented by Graham. Lucas' keys to the safety deposit box rented by him were amongst the property removed from his room.

An issue also developed at the hearing as to whether the 2 women were arrested in the motel rooms. This Court finds from the evidence that they were, in that their movements were restrained, they were taken to the Sheriff's office and not advised they were free to leave until after they were interrogated and after Graham's confession when the police were satisfied that they had no knowledge of the crimes.

This Court further finds that due to the foregoing, and the police initially not expecting the women to be returned to

the motel, that all the contents of the rooms occupied by the defendants were inventoried and removed to the Florida sheriff's office for safekeeping, and, after certain belongings were returned to the women upon their release that day, all the rest of the property was turned over to the New York State Police for return to New York.

On October 20, while the 1974 Lincoln was still in New Jersey, the trunk interior was dusted for fingerprints, and fingerprints of the deceased, Craig Mitton, found.

Defendants seek suppression of all items of evidence seized in New Jersey, claiming absence of probable cause for the search warrants issued by the New Jersey Court, and suppression of all evidence obtained in Florida by reason of the claimed illegality of the arrests there, including suppression of the confession by Graham as a result of said arrest, and of the inculpatory statement made by Lucas, They also seek suppression of the fingerprints found in the trunk of the car, of Lucas' hat, etc. Miscellaneous other grounds are suggested by defendants for the suppression of all the foregoing.

Defense counsel argued strenuously that, with respect to the New Jersey searches, the Florida warrantless arrest, search, seizure and confessions or admissions, that New Jersey and Florida laws, respectively, apply. They maintain that under the laws of such States, the evidence obtained in said States should be suppressed pursuant to applicable case and/or statutory law in said States, respectively.

This Court is by no means convinced that New Jersey or Florida laws differ significantly in their application to the

facts here from New York law. No expert testimony was offered with respect to the laws of such States, although citations of New Jersey and Florida cases and Florida statutes were made in their briefs.

Thus, a threshold question must be determined by this Court, i.e., whether the laws of such States are to be applied with respect to the evidence sought to be suppressed obtained in such States, or whether our own laws govern with respect to the admissability of such evidence.

Counsel have cited no cases bearing upon this conflict of laws question, and, indeed, this Court has not been able to unearth any New York case dealing with this conflict of laws problem in the criminal law area.

Turning to other jurisdictions faced with this question, there are cases persuasive, however, on this point. In Burge v. State, 443 SW 2d 720 (1969) the defendant was convicted of burglary and attempted rape in Texas. He was a resident of the State of Oklahoma, and while he was in Texas custody, his wife, at his Oklahoma residence, permitted police officers to search their home in Oklahoma without a warrant. Contrary to Texas law, Oklahoma grants to each spouse a personal right to demand a search warrant for the search of the marital residence. Upon said search which was made without the consent of the defendant, incriminating evidence was found and admitted at the Texas trial.

The Texas Court found the question to be evidentiary and procedural in nature, and thus governed by the law of the forum, and affirmed the conviction.

In People v. Saiken, 49 Ill. 2d 504, 275 N.E. 2d 381 (1971), the Supreme Court of Illinois, faced with the same problem,

adopted a broader approach, applying the "significant relationship", or "center of gravity", conflict of laws rule. The defendant in said case was convicted in Illinois of conspiracy to obstruct justice by concealing the body of a murdered victim on his farm in the State of Indiana. The victim had been murdered in Illinois, her body transported to and buried on the defendant's farm in Indiana.

As a result of certain information obtained by the police as to where the body was buried in Indiana, an Illinois police officer obtained a search warrant from a judge in Indiana, searched at the farm and recovered the body of the victim. The affidavit upon which the search warrant was predicated was based upon hearsay information and conclusions of the police officer, clearly insufficient under Indiana law, although adequate under the law of the forum state, Illinois. The evidence was admitted at the Illinois trial.

The Illinois Supreme Court, citing Burge, supra, and other authorities, upheld the conviction.

The Court pointed out that, traditionally, conflicting principles prescribed that issues of clearly procedural nature are governed by the laws of the forum, whereas substantive matters are controlled by the laws of the state where the transaction occurred. Yet, with respect to conflicting state views concerning Fourth Amendment and other rights, the law has been changing and the older rules are being replaced by more flexible rules such as the rule "significant relationship" with each of the states in question. The Court went on to say that if the problem presented was considered from the procedural-substance viewpoint, that the

evidence was properly admitted for two reasons, i.e., that evidentiary questions are generally governed by the laws of the forum and secondly, that if the conflict concerning the choice of law involves the preliminary issue of whether the evidence was wrongfully obtained, a substantive matter, then from the viewpoint of the "significant relationship" or "center of gravity" rule, the significant contacts in that case were with Illinois in that the crime was committed there, was being prosecuted there, defendant was a resident there, the great majority of witnesses were Illinois residents, that Indiana had no vital contact with the crime, and that the application of Illinois evidentiary law would not offend the comity of interstate relationships between Indiana and Illinois, and affirmed the conviction.

Thus, we see that the Illinois Supreme Court applied the modern conflict of laws rules applicable in the civil area to the criminal case before it.

We can also analogize, in the civil area, to New York cases on the subject. The trend in our state has also been to apply the law of the state which has the strongest interest in the resolution of the particular issue presented. Reference here to only several of the many New York cases on the subject should suffice.

One of the earlier and leading cases is Babcock v. Jackson, 12 N.Y. 2d, 473 (1963), dealing with tort liability. In Babcock New York people went in a New York registered automobile for a weekend trip to Canada. An accident occurred in Ontario causing personal injuries to one of the New York passengers. Ontario forbade a suit by the passenger against the driver owner.

In the New York suit, defendant moved to dismiss the complaint on the basis of Ontario law. Special Term granted the motion, and the Appellate Division affirmed.

The Court of Appeals reversed. Reviewing the history of this conflict of laws question, the court held that the substantive law to be applied would be that of the state which has the strongest interest in the resolution of the particular issue presented.

This approach has been referred to as the "interest analysis" approach.

In Farber v. Smolack, 20 N.Y. 2d 198, another negligence case, all parties were residents of New York. Defendant was the owner of the automobile loaned to the others for a trip to Florida. On the return trip, and in North Carolina, there was an accident as a result of which an action was brought in New York by the administrator of one of the deceased passengers killed in the accident and guardian of an infant injured therein as well as by another passenger. There was a difference between New York and North Carolina law with respect to the issue of liability of the owner. The North Carolina law required the jury to find that the use of the automobile was for the absentee owner's benefit in order to impose liability. The court followed Babcock, also citing Macey v. Rozbicki, 18 N.Y. 2d 289 (1966) in applying New York law.

Also following the "interest analysis" approach with respect to a contract involving the Statute of Frauds is Intercontinental Planning, Limited v. Daystrom Incorporated, 24 N.Y. 2d 372 (1969(, in which the court said;

"However, as we view this case, it is

> unnecessary to characterize the Statute of Frauds as either substantive or procedural since New York law should be applied in either event. If the statute be viewed as procedural, there is no problem since the law of the forum would be applied. Likewise, New York's Statute of Frauds would be applied as the law of the State whose law governs generally if the statute be considered substantive since New York has the paramount interest in the application of its law in this case. (Cf. Matter of Crichton, 20 N.Y. 2d 124, 133; Matter of Clark, 21 N.Y. 2d 478, 486; cf. Miller v. Miller, 22 N.Y.2d 12, 15-16.)"

See also Tooker v. Lopez, 24 N.Y. 2d 569, (1959), an automobile accident case in which both the majority and minority of the court used the "interest analysis" approach, but differed with respect to its application to the facts in that case, referring also to same as "grouping of contact" or "center of gravity" (p.590) and "contact theory or governmental interest theory" (p.596). The dissenting justices felt that the law of the place of the accident should govern the conduct and qualifiedly the status of persons, residents and non-residents, within it, except in the extraordinary situation where the localization of persons and conduct is adventitious. They felt that under the particular facts of that case the greater contact and stronger interests were with the state in which the accident had occurred. It is interesting to note that Associate Justice Jasen, concurring in the dissent, had authored the opinion for the majority in Intercontinental Planning, Limited, supra, handed down two weeks earlier.

A third line of cases refer to the deterrent effect on police conduct if an illegal search in a different jurisdiction were suppressed. Of course, we all understand that searches, arrests and

confessions made in violation of Fourth and Fifth (and Fourteenth) Amendment rights are to be suppressed wherever made. However, a forum court can make its own determination of constitutionality, subject to overriding federal case guidelines. Where evidence is illegally obtained, in violation of local law, but not rising to constitutional proportions, the forum court can select the law to be applied, and consider, in addition to the preceding approaches of Burge, supra, and Saiken, supra, the deterrence approach.

In People v. Orlosky, 40 Cal. App. 3d 935, 115 Cal. Rptr. 595 (1974), Indiana police received consent from defendant's wife to search the marital residence in connection with a local Indiana crime. Upon such search the police found evidence of a California crime, and transmitted same to California authorities who initiated a prosecution there, the court holding such evidence admissable under California law despite its illegality under Indiana law. The Court applied the "governmental interest" approach. It also examined the deterrent approach, the reason for the exclusionary rule, and found that police conduct in Indiana was not "dirty business", and that the police conduct was proper under California law.

A New York case dealing with a confession made in California is People v. Davis, 55 A.D. 2d 960. Although the conflicts of laws question was not discussed, the Second Department held, with citation of Federal and several New York cases, that a confession

obtained from defendant upon his arrest in California violated his 6th amendment right to counsel, and suppressed the same. The cases cited by the court, and relied upon by the court, did not involve conflict of laws questions. The Second Department evidently simply applied New York decisional law in determining whether the California confession should be suppressed.

Applying the foregoing principles to the case at bar, it is apparent that the State of New York has the greatest interest in this case, including the New Jersey searches, the Florida arrest, searches and confessions or admissions.

The alleged murder, kidnapping and robbery occurred in New York State, of a New York State citizen. The defendants were at least residents, if not domiciliary, of New York. Almost all witnesses in the New York prosecution are New York residents.

This Court will not say that neither New Jersey nor Florida have any interests in this case, as undoubtedly those states do have an interest in police conduct towards transients or visitors within their respective territories. But such interests are minor when compared to the overwhelming New York interests in prosecution of such heinous crimes as here committed amongst its own residents on its own soil. Indeed, the police activity in New Jersey and Florida was mainly conducted by New York State Police officers with the assistance of police officers in said states and the use of facilities in said states in aid of the New York State police officers.

Further, the application of New York law in this instance would not offend the comity of interest relationship between New York and the other states involved.

Nor would the police conduct in New Jersey or Florida, if illegal (which this Court does not find) require suppression as a deterrent.

Accordingly, this Court will apply New York law with respect to the New Jersey and Florida transactions, subject only to overriding federal law dealing with safeguarding Fourth and Fifth Amendment rights of these defendants.

The facts made known to the New Jersey Court were done so under oath. Even though the transcript of said application indicates the oath having been administered to Investigators Chandler and Ovens during the recorded and transcribed portion of the proceeding, Chandler's testimony that said oath was actually taken by him prior to his unrecorded testimony to said court is not only uncontradicted, but defendants were given the opportunity to verify same with the New Jersey Court and call the judge as a witness, which this Court would arrange, but, after discussion by counsel with said court, they did not call him.

In determining whether or not there was probable cause for the issuance of a search warrant, the critical facts and circumstances for the reviewing court are those which were made known to the issuing magistrate at the time he determined the warrant application. (People v. Nieves, 36 N.Y.2d 396, 402; People v. Hendricks, 25 N.Y. 2d 129, 138; People v. DeLago, 16 N.Y. 2d 289, 292, cert. den. 383 U.S. 963; People v. Rainey, 14 N.Y. 2d 35,38). See also People v. Brown, 40 N.Y. 2d 183, in which a search warrant was upheld even though an informant was interviewed by the issuing magistrate without being under oath, and without his testimony being recorded, although the same was referred to later by the court on the record.

The Fourth Amendment to the U.S. Constitution, and Article I, Section 12 of the New York Constitution require that search warrants be issued only upon probable cause supported by oath or affirmation. A written application in affidavit form is not absolutely required. An example in New York is the People v. Brown case, supra, where an oral application under oath by the police officer, and an off-the-record discussion with the informant, whose information was essential for probable cause, was held to be sufficient, and in substantial, if not literal, compliance with C.P.L. 690.35 (1).

In the case at bar, there was clearly a sufficient basis for the New Jersey Court to find probable cause for the issuance of a warrant for the search of the Lincoln automobile. And the securing of a warrant by the police will presume their bona fides and the subsequent search upheld in a doubtful or marginal case (People v. Hanlon, 36 N.Y. 2d 549, 558), although I do not consider the probable cause issue here to be doubtful or marginal. See also (Ker v. California, 374 U.S. 23).

The automobile itself became evidence in this case, particularly after the finding of deceased's fingerprints in the trunk interior, and, with the authority of the New Jersey Court, properly removed to New York.

Nor does the claim by defendants that the car was searched on October 17, and again thereafter, and dusted for fingerprints on the 20th indicate any improper or unauthorized conduct by the police. The car was constantly under surveillance by the police, and after obtaining the search warrant, they took possession of the keys and maintained constant control over the car in carrying out the search and testing for fingerprints, which they

were authorized to do.

This Court also determines that the arrest of the defendants in Florida, as it turned out to be without a warrant, was lawful upon several grounds.

This Court finds as fact that the arrest of the defendants was for the purpose of apprehension and prosecution for the mentioned crimes, and not as a subterfuge for an otherwise unlawful search or interrogation.

At the outset, it is clear that an interstate bulletin (teletype message) can furnish probable cause for a warrantless search (People v. Lypka, 36 N.Y. 2d 210). So, too, can police officers make an arrest upon a radio bulletin, telephone or teletype alert from fellow police authority (Whitely v. Warden, 401 U.S. 560, 568; People v. Horowitz, 21 N.Y. 2d 55, 60). However, despite the foregoing, on a suppression hearing the defendant may question the basis for such communication, and ultimately, upon such hearing the People must demonstrate that the sender or sending agency itself possessed the requisite probable cause to act (People v. Lypka, supra, and cases cited therein).

Under C.P.L. 140.10 a police officer may arrest upon "reasonable cause" to believe that the person has committed a crime. "Reasonable cause" in such context is the same as "probable cause" as such latter term is used in the Fourth Amendment (Draper v. U.S. 358 U.S. 307, 310; People v. Fields, 50 A.D. 2d 870; People v. Lombardi, 18 A.D. 2d 177).

"Probable cause" has been defined as a reasonable ground for belief of guilt, which is less than would justify

conviction (Brinegar v. U.S., 338 U.S. 160, People v. Fields, supra).

Not only did the Florida police have the toletype communication directing the arrest, but the New York State police officers were physically present and had conferred with the Florida police officers, filling them in on all the facts which were the basis for probable cause.

Accordingly, finding probable cause for the arrest of defendants, this Court holds that same was lawful.

Additionally, the police officers had the genuine belief that the New York arrest warrant had been issued on the 14th.

The Florida police, in effecting the warrantless arrest, did so in a manner consistent with New York law. Under C.P.L. 570.34 a police officer may arrest a person without a warrant "upon reasonable information" that the accused stands charged in another state for a felony.

The arrest of the defendants did not violate any of their Fourth Amendment rights.

The entry into the motel rooms by use of a passkey obtained from the motel manager and by entering through an unlocked door from an adjoining room, but without advance notice was justified in view of the facts that the murder weapon had as yet been undiscovered and there was reasonable grounds to believe that defendants were so armed, that they had a vicious dog, all of which would endanger the safety of the arresting officers, and

could also result in the destruction of evidence (C.P.L. 140.15, subd. 4, and C.P.L. 120.80, subd. 4). (See also Warden v. Hayden, 387 U.S.294).

The Court finds that the search of the 2 motel rooms occupied by the defendants and their female companions did not violate their Fourth Amendment rights, for 2 reasons, i.e., as incidental to the lawful arrests the police were entitled to search within the room of each defendant for the murder weapon and evidence (Chimel v. California, 395 U.S. 752; People v. Fitzpatrick, 32 N.Y. 2d 499, 508; Amador Gonzales v. U.S., 391 F. 2d 308 with respect to fruits of the crime, instrumentalities used to commit the crime, contraband, material which constitutes evidence of the crime or that the arrestee committed same), and secondly, the need for the Florida police to inventory, remove, and safeguard the contents, being unsure of the status of the women at the time of the arrests of the defendants.

The confession of Graham after extensive and repeated "Miranda" warnings, commenced within 3 hours of his arrest and 2 hours after his arrival at the Broward County Sheriff's office, was voluntary and after intelligent and knowing waiver of his rights to remain silent and counsel. There is no credible evidence in this record of any overreaching by the police, mistreatment, nor any other police conduct to taint the same. This Court has also had the benefit of listening to the tape recording of same, and agrees with the testimony of the police officers that Graham desired to be "cooperative".

It should here be pointed out that if, arguendo only, there were any infirmity in the arrest, that the confession is

nevertheless admissable.

In People v. Martinez, 37 N.Y. 2d 662, the court held that a confession made after an unlawful arrest and search was so attenuated from the search as to permit use of same.

However, in suppressing a confession made immediately after an unlawful arrest, in People v. Stewart, 41 N.Y. 2d 65, 70, the Court shed more light on when a confession is or is not to be considered so integrally related to the unlawful arrest as to require suppression, or so attenuated as to permit the same in evidence. In Stewart, supra, the police officer stopped defendant on the street pursuant to a police radio call based upon an anonymous tip to the effect that a person bearing defendant's description had a gun, frisked defendant unlawfully, searched and seized bullets and a gun. Upon questioning at the station about the gun seized, Stewart confessed to a robbery during which he acquired the gun. The items were suppressed, the Court saying: "In contrast to Martinez, the interrogation here was conducted by the same officer within a limited time frame, and the fruit of the arrest, the gun, was an integral part of the subsequent admission" (70).

In distinguishing Martinez, the Court said: "The key factors in Martinez were the absence of a purposeful exploitation of the initial illegality by the police, the lack of a casual link between the challenged police conduct and the statements made and the existence of a valid independent basis for the subsequent interrogation."

This Court believes the Martinez key factors to be present here. In arresting Lucas and Graham the police acted in the

good faith belief in probable cause, and their purpose was not interrogation, but prosecution. There was no "purposeful exploitation" of the arrest, as all the probable cause factors, if not justifying an arrest, warranted interrogation of the defendants, at the very least, for which there was a basis valid and independent of the arrest. For the same reasons, the arrest was not the cause for the interrogation.

In Brown v. Illinois, 422 U.S. 590, a 6 member majority of the Court suppressed 2 confessions made after an illegal arrest and search. The majority pointed out that the exclusionary rule is calculated to deter the police from engaging in violating constitutional rights by removing the incentives to disregard them (599,600) but made clear that despite its broad deterrent purpose, the rule has never been interpreted to proscribe the use of illegally seized evidence in all proceedings or against all persons, citing cases (600). The majority then went on to hold that the Michigan Court's reliance solely upon intervening Miranda warnings, as a Fifth Amendment safeguard, was insufficient to cleanse the Fourth Amendment violation (to which the purpose of deterrence also attaches). The majority then went on to point out the evil of unlawful searches and seizures for the sole purposes of investigation or interrogation. The majority suppressed the confessions because the search of defendant's apartment and his arrest were clearly without probable cause, known by the police officers to be unlawful, "the flagrancy of the official conduct", the police admitting in their testimony that the purpose of the arrest was

"for investigation" or for "questioning" (604,605).

The remaining 3 justices wrote 2 concurring opinions wherein Mr. Justice White concurred on the grounds that the police "knew or should have known" that the arrest was absent probable cause, while the remaining justices, concerned with the cost of applying the exclusionary rule as a deterrent, would apply the same to flagrant official misconduct, and would allow the confessions where "effective" Miranda warnings were given, and the ensuing confession were voluntary in the Fifth Amendment sense (612).

It can thus be seen that as recently as June 26,1975, it was the feeling of all of the justices of the Supreme Court that even though the search or arrest may be unlawful, if the police acted in good faith, believing there to have been probable cause (believing an arrest warrant to be in existence), the arrest being for the purpose of prosecution and not for the purpose of investigation or questioning, having an independent basis for questioning, and the intervening effective Miranda warnings, that the confession should not be suppressed.

The foregoing discussion in this opinion which assumes, arguendo only, that there was inadequate probable cause for the arrest should not be interpreted to mean that this Court doubts there was probable cause, but, instead as merely a recognition of its fallibility.

The inculpatory statement made by defendant Lucas on the airplane returning to New York was made without there having been any violation of his constitutional rights. After having been given his Miranda warnings on several occasions in Florida, he refused to talk to the police officers. According to his own

testimony he was well treated and not questioned further. On his appearance before a Florida Court where he waived extradition, he requested, and was furnished, with counsel to whom he spoke. On the airplane, defendant initiated a conversation with Investigator Reidy, and was again advised that anything he said would be used against him. Despite this warning, and without any interrogation, he enquired about whether he could deal with the District Attorney, that he may have been involved in the crime, but did not do it all himself, or words to that effect. Defendant, in his testimony merely denied having made this statement. This issue will be for a trial jury to determine.

There is no requirement that the police stop a person from volunteering a confession or admission, nor are such volunteered statements barred by the Fifth Amendment (Miranda v. Arizona, 384 U.S. 436, 478; People v. Gary, 31 N.Y. 2d 68; People v. Kaye, 25 N.Y. 2d 139).

The search warrants of October 20 for the 2 safety deposit boxes in 2 New Jersey banks were supported by affidavits clearly showing probable cause, based upon the evidence used to obtain the search warrant for the car, the confession made by Grafton who described the transactions with the banks and the hiding by him and Lucas of money from the robbery therein. Search warrant returns were all filed with the New Jersey Court and said court, by order, authorized all seized items (including the car) to be removed to New York.

In this regard it is important to note that Roberta Holmes, called by defendants, testified that she had no objection to the police taking the keys from her purse. Both she and

defendant Graham testified that Graham had given her the keys on October 14 in New Jersey. Consequently, the safety deposit boxes in New Jersey would have been discovered by the police in any event.

For reasons previously stated, the cowboy type hat inadvertently left by Lucas at the New York State Police barracks after being processed was not the product of any search. Upon realizing that it had evidentiary value, the police simply kept and have refused to return it.

It appears that the police are still in possession of many items of personal belongings and property of the defendants which were the result of the automobile search and inventory in the motel rooms, which have no evidentiary value. The District Attorney shall be directed to turn these non-evidentiary items over to such persons as the defendants, presently incarcerated, shall direct.

All motions to suppress physical evidence, the confession of Graham and the inculpatory statement of Lucas are denied.

The District Attorney shall submit the order hereon.

DATED: June 16, 1977.

At a Term of the Appellate Division of the Supreme Court of the State of New York, held in and for the Third Judicial Department at the Justice Building in the City of Albany, New York, commencing on the 29th day of May 1979.

PRESENT:

HON. A. FRANKLIN MAHONEY,
Presiding Justice

HON. MICHAEL E. SWEENEY
HON. T. PAUL KANE
HON. J. CLARENCE HERLIHY
Associate Justices

----------X

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

-against-

RICHARD B. GRAHAM,

Appellant.

----------X

The defendant, RICHARD B. GRAHAM, having appealed from a judgment of conviction of the County Court, County of Sullivan, rendered on the 3rd day of November 1977, from a jury verdict convicting defendant of two counts of murder in the second degree, kidnapping in the first degree, and robbery in the first degree, and said appeal having been presented during the above stated term of this Court, and having been argued by STEPHEN L. OPPEN-

Exhibit "C"

HEIM, ESQ. of counsel for appellant and by STEPHEN F. LUNGEN, ESQ. as special prosecutor for the Sullivan County District Attorney's Office for respondent, and, after due deliberation the Court having rendered a decision on the 26th day of July 1979, it is hereby

ORDERED that the judgment should be modified, on the law and the facts, by reversing the convictions of kidnapping in the first degree and robbery in the first degree and dismissing the counts of the indictment therefor, and, as so modified, affirmed.

E N T E R

/s/ John J. O'Brien
Clerk

DATED AND ENTERED: August 8 , 1979
A TRUE COPY:

John J. O'Brien
Clerk

At a Motion Term of the Supreme Court of the State of New York in and for the Third Judicial Department held at the Justice Building in the City of Albany, New York on the 20th day of August, 1979.

P R E S E N T :

HON. A. FRANKLIN MAHONEY, Presiding Justice
HON. MICHAEL E. SWEENEY
HON. T. PAUL KANE
HON. J. CLARENCE HERLIHY, Associate Justices

----------x

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION : THIRD DEPARTMENT

----------x

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

-against-

ORDER

RONALD B. GRAHAM,

Appellant.

----------x

A motion having been made by the defendant-appellant, RONALD B. GRAHAM, at this term of Court in the above-entitled action for an order for leave to reargue the appeal herein and upon the reargument to reverse the judgment appealed from.

NOW, after reading and filing proof of due service of the notice of motion and affidavit of STEPHEN L. OPPENHEIM, sworn to the 6th day of August, 1979 in support of the motion, and the affidavit of STEPHEN F. LUNGEN, sworn to the 17th day of August,

1979 in opposition thereto, and the Court having rendered a decision on the 27th day of September, 1979, it is hereby

ORDERED, that the defendant-appellant's motion for reargument be and the same hereby is denied.

ENTER,

/s/ John J. O'Brien
Clerk

DATED and ENTERED: October 5, 1979

A TRUE COPY:

John J. O'Brien
Clerk

State of New York
Court of Appeals

BEFORE: HON. LAWRENCE H. COOKE, Chief Judge

THE PEOPLE OF THE STATE OF NEW YORK,
Respondent,

against

[illegible] GRAHAM,
Appellant.

CERTIFICATE DENYING LEAVE

I, LAWRENCE H. COOKE, Chief Judge of the Court of Appeals of the State of New York, do hereby certify that, upon application timely made by the above-named appellant for a certificate pursuant to CPL 460.20 and upon the record and proceedings herein,* there is no question of law presented which ought to be reviewed by the Court of Appeals and permission to appeal is hereby denied.

Dated at Monticello, New York
December 3, 1979

Lawrence H. Cooke,
Chief Judge

*Description of Order: Order of the Appellate Division, Third Department, entered August 8, 1979, modifying on the law and the facts, the judgment of the County Court, County of Sullivan, rendered November 3, 1977, by reversing the convictions of kidnapping in the first degree and robbery in the first degree and dismissing the counts of the indictment therefor and, as so modified, affirming the judgment convicting appellant of two counts of murder in the second degree.

AD [illegible] 3rd Dept.

APPENDIX F

Items Seized at Search, Airport Motor Lodge, Fort Lauderdale (Dania), Florida - October 19, 1975.

Exhibit #	Description of Items	Described at R/A page
46	Approximately 100 photos in an album	526, 555
47	Travellers checks taken from wallet	526, 527
48	Checkbook	526
49	2 Western Union receipts and Travel Lodge receipts taken from wallet	526, 528
50	Honda key and rent-a-cycle receipt taken from wallet taken from pants	527, 528
51	Receipt for safe deposit box and key found in wallet	529-530
52	Claim check for car in Newark	530
53	Western Union receipt, airline ticket receipt, American Express receipt for checks	531
54	National Car rental contract taken from briefcase	531
55	Times watch, miscellaneous receipts, nail clipper, shield number from hook and ladder company in Walden, New York	531
56	Eastern Airlines ticket receipt taken from brown briefcase	532
57	Black address book, $145.88 in cash, comb taken from pants pocket	533
58	Receipt for safe deposit box, two red key cases each containing a key taken from purse of Roberta Holmes	533

59	Taxi business card of Neil R. Bucklin taken from wallet	533-4
60	Travel Lodge receipt taken from pants pocket	534
61	Wallet taken from pants pocket	536
62	Longine watch, silver necklace, man's necklace man's gold wedding ring	536
63	Dog race track paramutual ticket and program	536
64	Brown plastic briefcase	536-537
65	Black leather briefcase	537
66	hat	537
	4 Delta Airline ticket envelopes	570
	One pair of two-tone blue jeans	593-595

One maroon T-shirt with collar. Pair of panty hose. One blouse, lady's blouse. Child's sweatshirt, "Parrot Jungle, Miami, Florida", written on it. Second child's sweatshirt, "Parrot Jungle," written on it. Lady's one-piece body shirt. A movie camera, taken from the room of R. Graham, Dania, Florida, Travel Lodge Motel, a Kodak Ektasound 140. And an OKAY used vehicle dealer warranty to Cheryl Kilb of Newburgh, New York. A mascara applier. A chain containing a Jewish star in silver color. A plastic bag from Parrot Jungle with the name Cheryl on it. Paper bag. A Kodak camera case, town tones, of brown leatherette, containing an instruction book for Polaroid SX-70 Land Camera. And two SX-70 Polaroid Land Cameras. That completes the contents of the brown suitcase.

In the first box is a pair of chino men's pants. Pair of brown men's pants. A brown embroidered western man's shirt. A brown man's suit jacket. A green, white and blue man's Hawaiian type shirt. Brown man's leisure suit jacket. A brown type work leather belt. A white T-shirt, man's, with "Fort Lauderdale,

Florida," and birds on it. A man's green shirt. Pair of red and white polka-dot men's swim trunks. A white man's sleeveless T-shirt, undershirt. Another undershirt. A third undershirt. Two pairs of men's white Jockey shorts. Pair of blue socks. Pair of black socks. Two black combs. A tie clasp in the form of a truck. And another tie clasp with two horse symbols.

In the second box is a men's beach shirt which matches the swim suit. A blue floral shirt. A blue and light brown and gold man's shirt. Pair of under shorts, red, black and blue and white. Another pair of under shorts, red, blue and white in block design. A man's white sleeveless T-shirt. Pair of man's brown pants. A man's blue with light piping cabana shirt. A pair of swim trunks wich matches the cabana shirt. A blue man's leisure suit jacket. A light blue pair of pants. A man's light blue leisure jacket that matches the last pair of pants. A man's brown leather belt. A pair of dark blue and light blue diamond pattern design -- two pair of black men's socks in original wrapping. Pair of brown socks. And another belt, leather on one side, suede, rust color, on the outside.

Items Seized but later returned to other persons

Description	Described at R/A page
Automobile	366
Motorcycle	366
2 While motorcycles helmets	369, 569-70
Brown lady's purse	369
Miscellaneous papers of Cheryl Kilb	369
$47.87 in cash	369
Brown suitcase with miscellaneous women's toiletries	369
Lady's suede purse	370
$24.54 in cash	370
Items of men's clothing	587

APPENDIX G

Items Seized in Search of Lincoln Automobile at Gateway Downtowner Motel, Newark, New Jersey, October 17, 1975.

Exhibit #	Description of Items	Described at R/A page
1	Bag with assorted rags	33
2	Vacuum sweepings from various areas of car	34
A.	Vacuum sweepings from right front inside	34, 55
B.	Vacuum sweepings from rear seat	34, 56
C.	Vacuum sweepings from left front	34, 56
D.	Vacuum sweepings from left rear	34, 56
E.	Vacuum sweepings from right front interior	34, 56
F.	A hair from trunk	34, 56
G.	Vacuum sweepings from right rear interior	34, 56
H.	Vacuum sweepings from trunk interior	34, 56
I.	Ashtray contents	34, 56
3.	Miscellaneous papers from trunk of car consisting of:	34, 57-62

envelope of the Empire National Bank stamp dated August 19, 1975, and an envelope of one Geldenning Place stamped date July 15, 1975, sealed. Mobile receipt for $10.30, January 28, 1975. Empire National Bank 24 hour teller receipt of July 1, 1975 the amount of $50, 1520297. A piece of small note paper addressed with Honey and signed Sheryl. A box rent receipt, United States Post Office, Walden, New York, June 19, 1975 to R. Lucas, #233. Bank Americard receipt for $5.25, June 25, 1975 to Richard Lucas. Empire National Bank receipt for the sum of $300 dated June 25, 1975, serial number 151461. A receipt. truck stop of Pennsylvania, amount of $7.06, June 6, 1975. A receipt of J.I. Russa & Son Jewelers, Walden, New York, dated March 26, 1975 in sum of $31.20; A note on the back of a piece of paper headed miscellaneous general voucher containing the name Leland Sisson

a letter of Highland Telephone dated August 6, 1975 addressed to Richard P. Lucas; a receipt of Rhulen Sisson to Richard Lucas Lucas dated May 29, 1975 showing a bank balance of $100; a receipt of Rhulen Sisson to Richard Lucas dated May 29, 1975 for $160 rent; a receipt of Leland Sisson to Richard Lucas dated August 7, 1975 for $160 for rent; a Bank Americard receipt for $10.30 dated June 26, 1975 for the of East Stroudsberg, Pennsylvania; Union 66 receipt of June 5, 1975, $7.85 to Richard Lucas; Empire National Bank 24 hour teller receipt dated July 17, 1975 the sum of $239.36, 153200 is the serial number; Empire National Bank 24 hour teller receipt dated July 9, 1975 for the sum of $250, number 152673; a wage deduction sheet of Cooper-Jarrett, Inc. for June period ending June 14, 1975 showing the net pay of $395.50, check number 276011; Empire National Bank 24 hour teller receipt of June 5, 1975, the sum of $190.77, 1150565; a Carrol's matchbook with writing figures on it; a small piece of note paper dated May 3, addressed to whom it may concern, signed Carol A. Lucas; an Empire National Bank checking account miscellaneous debit of March 24, 1975 contains inward to close the account; an envelope with a window containing a notice from the general notice acceptance, layed claim due dated August 5, 1975; a Bank Americard receipt to Richard Lucas from Rob Rohl, Inc., in the sum of $6 dated June 21, 1975, Bank Americard receipt to Richard Lucas from the Truck Stops of America dated June 22, 1975 in the sum of $8.25; Empire National Bank 24 hour teller receipt of August 7, 1975, serial number 1545, $276.50; Empire National Bank 24 hour teller receipt Dated August 2, 1975, 154227 in the amount of $236.83; Empire National Bank 24 hour teller receipt dated July 21, 1975, 153511, in the amount of $50; Empire National Bank 24 hour teller receipt dated July 24, 1975, 153652 in the amount of $50; Empire National Bank 24 hour teller receipt dated July 26, 1975, 153762 in the amount of $25; Empire National Bank 24 hour teller receipt of July 26, 1975, 153761, $25; Empire National Bank 24

hour teller receipt of August 7, 1975, 154523, in the amount of $50; Empire National Bank 24 hour teller receipt of August 7, 1975, 154524 in the sum of $25; Empire National Bank 24 hour teller receipt of August 14, 1975, 155013 in the amount of $50; a check of Richard Lucas, 198 drawn on the Empire National Bank to Night Market, $10; check to Richard Lucas, 191, of August 7, 1975 to Leland Sisson $160; check of Richard Lucas, 189, Leland Sisson, $190; check of Richard Lucas number 195, August 12, 1975, Grand Union, $10; check of Richard Lucas, 197, August 13, 1975, Commissioner of Motor Vehicles, $10.25; check of Richard Lucas, #194, Night Market, August 7, 1975 for $10; check of Richard Lucas, #196 of August 13, 1975, Daniels & West, $17.53; check of Richard Lucas of August 5, 1975, #193 to the Grand Union, $10; check of Richard Lucas, #188 of July 21, 1975 to the Grand Union, $15; check of Richard Lucas, #190 of August 1, 1975 to the General Motors Acceptance Corp., #154 then I have a check of #185 July 22, 1975 to Charlie's Market, $10; check of Richard Lucas, #187 of July 27, 1975 to Florence Lucas, $25; #186, Richard Graham of July 25, 1976, $24; a check of Richard Lucas #184 July 17, Prudential Insurance Company, $25.42; check of Richard Lucas #182 Metropolitan Life Insurance Co., $27.05 of July 17, 1975; check of Richard Lucas #174, to the Prudential Insurance Co. for the sum of $25.42 of June 30, 1975; #1832 BAC, July 17, 1975, $50; statement of account of Richard Lucas for the period opening July 18, 1975 and dated August 15, 1975; an envelope of the Highland Telephone Co. addressed to Richard Lucas, wage statement of Cooper-Jarrett, Inc. for the period ending July 12, 1975, in the sum $239.36 for check #281637; wage statement of Cooper-Jarrett ending for the period of July 26, 1975 in the amount of $236.83, check #284269.

MR. OPPENHEIM: Wage statement for check #278859 for the period ending June 28, 1975, net pay $51.04; wage statement for check #2828-16 for the period ending July 19, 1975; wage statement for check #780108 for the period ending July 5, 1975; wage statement for check #27-3885 for the period ending May 31, 1975; Bank Americard receipt from the Truck Stops of Pennsylvania to Richard Lucas, dated June 22, 1975 for the sum of $8; wage

statement for check #274421 for the period ending June 7, 1975 to Reichs Banknotes for 20,000 marks but I don't know what kind of marks; a personal money order receipt of the Empire National Bank of April 28, 1975, #145628 to the Orange County Probation Department; a wage statement for check #2727 -- period ending June 21, 1975;

Exhibit #	Description of Items	Described at R/A page
4	Miscellaneous papers from the car consisting of:	35, 65-6

a plastic flag, from Great Adventure, Sheryl; a drawing signed Bevins, dated October 11, 1975 with writing on the back, Virginia Bevins; a printed slip of Eastern Airlines bearing the writing flight number 157 having bi-centennial terms on it; a receipt #260941 Holiday Inn of Daytona Beach, Florida, covering the period of October 8, October 12, portion of an Eastern Airline ticket, stamped October 8, 1975, NYC Kennedy to Daytona Beach; a card with back writing including flight number 157; a piece of lined note paper with various writing including, "dad, wake me up before you go to work"; an American Express Card application, signed Richard B. Graham, Sr., October 8, 1975, Eastern Airlines envelope with a ticket -- package stub attached for flight 157 to Daytona Beach, that's flight 157Y; an envelope of the Holiday Inn west of Daytona Beach addressed to Mrs. Anthony Parisi with a letter inside dated October 8 addressed Gram and signed "love always, Richie."; portion of an Eastern Airlines special service ticket #229623, stamp dated October 8, 1975; small piece of unlined note paper having on it various writing; including Avis 253-8183; an envelope addressed to the Spivak Agency, Inc. having a handwritten notation on it of flight 106;

Exhibit #	Description of Items	Described at R/A page
5	Papers from right front of car consisting of:	35, 66

a crumpled package of Benson & Hedges cigarettes, a package of four cigarettes, wrapper from a piece of Wrigleys doublement chewing gum; a matchbook, more cigarettes; a matchbook, Foodtown;

a piece of paper from a sugar packet; a piece of foil; a tab from a soda can or beer can; a receipt from a register Great America, $2.52; another piece of foil; a piece of cardboard paper from the log book; a driver's daily, log book of Richard P. Lucas, first entry July 2, 1975, mileage 408 miles; file entry July 31, 1975, off duty; another log book, first entry August 1, 1975 marked off duty; the last completed entry being August 14, 1975, 408 miles;

Exhibit #	Description of Items	Described at R/A page
6	Black Wallet and papers of Richard Graham consisting of:	35, 66-9

a wallet, piece of hair or matting contains a card of Donald H. Hannah, Central Hudson Gas & Electric Corp., receipt November 7, 1973, deposit #435299; Grand Union receipt -- withdrawn. Receipt of payment to the Milk Drivers and Dairys Employees Union of November, it says 38, 1973 probably November 30; it's not clear, $401; a receipt of Milk Drivers and Dairy Employees Union, December 28, 1973, $24; social security account number of Richard B. Graham, II 113-42-8995; social security account number of Richard B. Graham, Jr., #113-42-8995; member of the International Brotherhood of Teamsters, initiated November 30, 1973; a cash register receipt with numbers and writing on it; a portion of a cash register receipt with the writing Richard Graham, WE621 on it; another such receipt, Richard B. Graham, weekend of June 14, no number; a receipt of April 22, 1975 for 5 cents; operators license of Richard B. Graham, 6009759, September 24, 1971; a piece of paper with the name Jimmy, ie who is on at the period; a receipt of James Flannery, DVM 18422 of October 8, 1975 for $10; a card of Nycrest Corp. with writing on the back including the name of Bob Steel; a communion prayer card in plastic; a card of N.F.I. personnel Agriculture of Newburgh, Inc. with the name Marcia on it; TWA "getaway car" to Richard B. Graham, II,

1521542139700; a receipt of Tony's Parking and Lockers #2341; a membership card in plastic [illegible] Fish and Game Club, 1017; a plastic card of the Wife Swappers Club International a membership card of Blackrock Fish and Game Club, #186; a receipt of J.C. Penny Co., Inc., 678631 for the sum of $56; a color photograph in the bag says to Jeff with love always Birdie; another card of Nycrest Corp., #5619951; a group information card of the Hartford Life Insurance Co., Hartford Life and Accident Insurance Co., Hartford Accident and Indemnity Co., policy holder being the Nycrest Corp; a slip of paper receipt of May 9, 1975 for $140 from Jay Jay McCort; a green office memo of July 19, 1975 being a thing of certain items sold to Edward J. Halford; slip of paper with the name Dana to Reesa Wolhrab and other writing; a claim check of Radio Shack, May 24, 1975, #154875; a receipt of Walden Auto Parts, Inc., #10257 of January 30, 1975, the name of Walt Kendy on the back and other figures; a receipt of Gulf, #B2549682, $25 marked paid in full; a repair tag and invoice of Radio Shack, #083886, dated May 10, 1975; a club member card of Ice Cave Mountain, 1974 in the name of Iris Agroyan; a card of Newburgh Part Motors, Inc. with the word Tex and numbers on the back; a penny arcade photo of a girl with writing on the back, "to Richie with all my love"; selecti[illegible] service registration of Richard Barcley Graham, Jr.; notice of classification of Richard B. Graham, Jr., July 9,1969; receipt of something Weaverco, Inc. of June 17, 1975 in the sum of $25.80; customer signature card of Richard B. Graham, #634-BL7 and a resident fishing license #RF610309, for the period October 1, 1973 to September 30, 1974;

Exhibit #	Description of Items	Described at R/A page
9	Miscellaneous papers from glove compartment consisting of:	37, 69-81

a red leatherette Texaco road atlas; envelope, P.O. Box #861, Middletown, New York, of August 25, 1975, containing Bank Americard statement to Richard Lucas for the billing period

8/21/75, also including a blue notice, Bank Americard is now past due; a purchase of Mobile Oil Corp. of July 28, 1975 for the sum of $10.30; and a pamphlet which starts, "most people like puzzles, but not when it comes to paying bills."; envelope of P.O. Box #861 of September 25, 1975 containing a Bank Americard statement, billing period September 22, 1975, a blue slip saying, "your Bank Americard is now past due"; and a card dated October 17, 1975 showing a balance of $804.39; a purchase of Sunoco of $11.75 of August 31, 1975; a purchase card of Sunoco of August 30, 1975, $12; a purchase card of August 29, 1975; Exist 31 Motel, $31.03; a purchase card of Blue Ridge Motel of August 30, $29.96; a purchase card of the Mohawk Motor Lodge of August 27, 1975, $23.54; a Bank Americard flier headed "you may now request a cash advance from $50 up to your available credit line balance; mailing envelope flier; Bank Americard for the purchase of an all-weather jacket; an envelope of the Empire National Bank of Newburgh dated September 18, 1975 with a statement of Richard P. Lucas dated September 16, 1975 containing an Empire National Bank white and gray unfilled out check of Richard P. Lucas; 205, August 23, 1975 to a Neil Buckland, $12; check 277, September 4, to Beneficial Finance, $26.61; a check of Lucas, 202, August 20, 1975 to the Grand Union, $15; check of Lucas, 218, September 6, 1975, Village of Walden, $4; #214, August 28, 1975 for cash, $30; check of Richard Lucas, #199, 8/14/75, Charlie's Market; check #211 dated August 28, 1975, BAC, $50; #209, Leland Sisson's, in the amount of $190 of August 28, 1975; #207, August 26, 1975, Mike's Market, $10; #215, August 2 to the Holiday Inn, $2.26; check #216, September 2, 1975, cash, $30; #206, $8.25 to the Grand Union -- $25; #203, 8/21/75, to Charles Rakowski for the sum of $100; #204, Richard Lucas, Capitol Finance, $8.28; a check to Richard Forsyth in the sum of $180; check #208, August 27, 1975 to the Grand Union for the sum of $35; notice if insufficient funds and charges of the Empire National Bank, August 29, 1975, $15; notice of insufficient funds and charges, August 28, 1975 for a check of

$10; notice of insufficient funds of August 26, 1975 for two checks, one of $15 one of $25; an insufficient fund non-collected funds, returned check credited of the Empire National Bank, August 26, 1975, for the sum of $15; insufficient funds and uncollected funds, and return check credit of August 28, 1975, for $10; Empire National Bank 24 hour teller receipt of August 25, 1975 marked paid August 25, 1975, dated August 23, 1975, 155576 for $25; Empire National Bank 24 hour teller receipt of August 21, 1975 #1155446 for $25; an envelope of the Highland National Bank of Newburgh, September 2, 1975 containing a Continental Insurance Co. certificate of insurance on loan or account 00-18-6-2109; a Highland National Bank of Newburgh payment book which only payment stub one is taken out. The rest are here on account number 318002109; New York State Insurance indentification card issued to Richard P. Lucas, effective date September 12, 1975, expiration date, March 12, 1976; a plastic envelope containing a certificate of registration issued to Richard P. Lucas for a 1974 Lincoln, 9000-HQ; a retail installment contract signed by Richard P. Lucas, Daniels & West, Inc., dated August 12, 1975; a letter of Daniels & West, Inc., form letter with warranty, dated August 12, 1975; an envelope of New York State Department of Motor Vehicles dated August 21, 1973 containing a certificate card saying "contains certficate of title of a vehicle", New York State Indentification card to Richard P. Lucas, period June 12, 1975 to March 12, 1976; a form, NV50.2, used vehicle certificate of the Department of Motor Vehicles; odometer certification, Daniels & West, Inc. for a 1973 Chevrolet that's a yellow one; another one, odometer mileage certificate of Daniels & West, Inc. for a Lincoln Continental; a sales statement of Daniels & West, Inc. to Richard P. Lucas covering the 1974 Lincoln dated August 12, 1975; all of those items being in clear plastic envelopes; an envelope of William E. Cleary, Metropolitan Life, 603, Port Jervis, New York addressed to Richard P. Lucas containing a lot of blank envelopes stamped to William E. Cleary, Metropolitan Life, Box 603, Port Jervis

New York, the exact number of those envelopes, white envelopes, is ten; Western Union money order receipt, Mod, 905688, $100 to Carol Lucas; a box of the Empire National Bank addressed to Richard P. Lucas, inside the mailing box is another box, Spirit of America, inside that box is a flier for the Bicentennial American Revolution, Spirit of America checks; a green and white form bearing inspection #32695; a checkbook of Richard P. Lucas of the Empire National Bank going from check 251 to and including check 275 with unused deposit slips at the back; another check-book going from #276 to 300 with unused deposit slips on the back; and an envelope in green and white which has open lines for addresses, no addresses on it; and envelope with the printed stamp of Morristown, New Jersey, containing therein a receipt fo the Beneficial Finance System of September 17, 1975 showing a payment and other credit of $54; a flier of the Beneficial Finance System, special announcement for cousins, parents, etc.; a gray envelope bearing no writing on the outside except first class mail, place postage -- necessary postage here contining two windows; a form, BC30NYED, January '75 which starts out according to chapter 20, article 34 of the general business law of New York; an envelope from St. Lukes Hospital, Richard Lucas spelled L-U-K-U-S which as not been fully opened from which I can extract a balance due, bill of August 9, 1975, the sum of $69.25; a card of the Double R Electric Service, Inc. with writing on the back; a paper napkin; and a card of Brownell Motors, Inc.; card of the Mohawk Motor Lodge; receipt of Sun Oilof August 30, 1975, ticket 7020021 in the sum of $12; A Bank Americard receipt of August 31, 1975,, Mohawk Motor Lodge, $23.54; half a match cover of H.E. Harris & Co.; envelope with the words L & D written in hand out-side and contained therein a summons with notice and action, Pearl Appliances, Inc. against Richard Lucas, to which is attached a schedule A, a bill of Pearl Appliances; an envelope from P.O. Box 563 addressed to Richard Lucas and containing therein a memo, Mgr., Finance Service, Inc., dated August 15, 1975; and a notice

to Assignor dated August 15, 1975 signed by R.G. Cervo; a checkbook of Richard Lucas containing one check filled out #213 dated August 28, 1975, Valley National Bank, and containing some money; unused deposit books; notebook page, September 9, 1975, Dear Luke, signed C and Tom; a card, pink card tatooing; a receipt of the Chauffeurs Warehousemen and Helpers of America for $12, August 15, 1975; another receipt of the Connecticut Turnpike for $50; customer receipt for United States money order, #19252126923, $25; the date is July 21, 1975; a piece of lined note paper, headed one-half cup cider, vinegar; a payment receipt of the Financial Service, Inc. for $8.21 of August 21, 1975; an envelope, first class mail prestamped, Des Moine, Iowa containing therein a receipt statement from the Financial Service, Inc., to Richard Lucas, dated September 23, 1975 and shows amount due of $92.25 and also contains therein an envelope with windows -- three windows and inside shows pink and white candy stripes; a card of Rick Forte with writing on the back; Bank Americard receipt to Richard Lucas of 8/29, sum $39.03; a book of matches from Shopwell; a comb; a Jarrett wage statement for check #228965 of August 9, 1975; a receipt of the Chauffeurs Warehousemen and Helpers of America, May 14, 1975 for the sum of $12; another card of tattooing with the word Richard and the #652-0950 written on it; a drawing card of the Wallkill Fire Department #117, another drawing card of the Wallkill Fire Department #123 and a Mobile receipt of $10.50 from L. Mirtallo; a receipt of the Chauffeurs Warehousemen and Helpers of America for $12, July 25, 1975; a receipt for voluntary surrender of registration of plates issued 8/12/75 to Richard Lucas; an envelope of the Motors Insurance Corp. dated July 18, 1973, Albany, New York containing a letter of Motors Insurance Corp. dated July 19, 1973 addressed to Richard P. Lucas; a form headed "agreement to provide physical damage insurance" dated July 19,1973; New York State Insurance identification card to Richard P. Lucas effective date March 12,

1974 to March 12, 1975; business reply mail postcard to the New York State Department of Environmental Conservation regarding a deer report; a registration to Richard P. Lucas for a 1973 Chevrolet pickup expiring April 30, 1974; odometer mileage statement on a Chevrolet dated July 19, 1973 attached to a car invoice, #9813A of Barge Chevrolet, Inc. dated July 19, 1973; a letter from the Department of Motor Vehicles addressed to Richard P. Lucas dated May 7, 1973; certificate of life insurance protection issued to Richard P. Lucas of the Credit Life Insurance Co., #A9576 effective July 19, 1973 and attached to that a certificate of accident and health insurance of the Credit Life Insurance Co. of July 19,1973 bearing the #A9576 also, a pamphlet for the official New York State Bicentennial Medal; retail installment contract between Lucas and Barge Chevrolet, Inc. of July 19, 1973; an envelope pamphlet of the New York State Department of Motor Vehicles with the heading "suppose your license were taken away"; a brochure, 1973 Chevrolet , light duty truck emission control systems; a warranty, 1973 Chevrolet truck, dated July 19, 1973; also contained in that envelope I am presently describing is another envelope of the Motors Insurance Corp. of August 1, 1973 in which there is a notice headed "important, your C.I.M. policy is enclosed"; a Motors Co. physical damage policy, family automobile form; an envelope addressed to the Motors Insurance Corp.; identification card, back headed "what to do in case of accident"; a Motors Insurance Corp. amendment, termination provision for New York; a statement for the policy covering period July 19, 1973 to July 19, 1974; an address book with invitations, wood grain cover, actually, it's not stamped on the front cover, A to A, index note-book, it contains addresses; a card of the Crawford & Co., writing on the back including grandma; a corner of an envelope with the number 561-6177; a room assignment card of the Exist 31 Motel of August 29; a card of the Walden Insuring Agency with writing on the back, 564-1660; 24 hour teller receipt of the Empire National Bank of August 14, 1975, #155012 in the amount of $244.85; a piece of

paper headed with the name Wayne on it; 24 hour teller receipt of the Empire National Bank of August 21, 1975, #155445 in the amount of $188.61; a card of Daryl Porn, Mgr., Texaco, writing on the back headed "Evelyn"; a deposit receipt of the Empire National Bank of August 3, 1975, -- no, that is September 4, 1975 in the sum of $200; a Bank Americard receipt of August 30, 1975 in the sum of $29.82, Blue Ridge Motel; Sun Oil Co., receipt August 31, 1975 sum of $11.75; a sheet of note paper headed "Joe Short."; an envelope, part of the envelope dated July 18, or June 18, 1975. It's not clear, it is addressed to Cheryl Crone with writing on the inside of the envelope; a card of Burtling Realty, Inc. with writing on it. Writing on the back headed, "mom"; a stub, Valley National Bank, Walden, New York of July 8, 1975 in the amount of $49.70; a receipt of Marie Boat, $4.00, September 6, 1975, #3305; a Mobile travel map of Colorado and Wyoming; a Texaco map of New York; a Sunoco map of New York; a Texaco map of Delaware, Maryland, Virginia, and West Virginia; a Texaco map of Maine, New Hampshire, and Vermont, and an unused self-postal envelope with a U.S. postage, Boston, 10 cents; an envelope of the Travelers dated September 18, 1975 including therein a card addressed, "Dear Policyholder."' a card in a red and white envelope with a Sears and Roebuck Co. dated August 18, 1975 containing therein a statement of of August 15, 1975 total due of $15.75; also containing a Sears advertisement for Charlie's perfume; business reply mail card to Allstate Insurance Co. and the business reply envelope to Sears, Roebuck & Co.; an envelope of P.O. Box #999, West Port, Connecticut stamped August 21, 1975 containing therein to the Danbury Mint, Medallic History of America, two coins in a card, an envelope addressed to the Danbury Mint and billing statement for $31 dated August 22, 1975; an unopened Bic Click Blue refill; a black Write Brothers medium point pen with cover; a shocking pink Bic Click pen; a piece of rubber tubing about two inches long; a red and clear plastic Bic pen; a 5 cent piece, Buffalo, and another paper napkin;

Exhibit #	Description of Items	Described at R/A page
10	Papers secured from sun visor of car consi[illegible]	.7, 81-83

White envelope, State of New York Department of Motor Vehicles dated September 9, 1975. Inside the envelope is a certificate of title of Richard P. Lucas, #C1868132 with a letter entitled, "enclosed is the certificate of title of your vehicle."; a white envelope addressed to Casualty and Insurity, Davis and Life Casualty, Richard P. Lucas; white piece of paper with a yellow caution sign, caution sign which says, "your annual key fee is past due from Playboy Club."; a bill from the Playboy Club to Richard P. Lucas in the amount of $183.01, dated September 28, 1975; a letter addressed to the Play Boy Club International, Inc. on the face of the letter indicates "don't move an inch" with a picture of an optical tape measure; a document from the U.S. Department of Agriculture, Farmers Home Administration with an option to purchase real property, with a description of the property which should be conveyed to Barbara S. Paust, containing a description of the property, total price of $19,000 envelope dated October 6, 1975 containing a statement from the Playboy Club, inside it has an advertisement for 15 day free trial for a tire inflator; a base mail reply from the Playboy Preferred, Inc.; an advertisement for a suede cowhide jacket; a piece of white scrap paper with the number 77813977 with the name Ronnie on the back and several numbers and figuring on the side; a white envelope from Etna Life & Casualty dated September 29, 1975, containing a letter to Richard P. Lucas from the Etna Life & Casualty; report on an accident dated 9/1975; an envelope from Sharon Yankow; an envelope from the Travelers, Hartford, Conn., dated September 10, 1975 containing policy identification number, Travelers Insurance Co. number 0089660841011; also containing a black-blue envelope; white and green bordered first class mail envelope with no address containing a receipt from the

Beneficial Finance Co; also containing a special announcement to cousins, uncles, grandparents, friends, containing two of those I just read; yellow paper reciting the law according to chapter 20, article 24 of the general business law of New York; also containing a gray blank envelope dated -- Hartford, September 9, 1975 from the Travelers Insurance Co. containing New York State identification card for one Richard P. Lucas; also containing a copy of the New York State insurance identification card for Richard P. Lucas and a letter entitled "Dear Policyholder, here are your new insurance identification cards."; an agreement between Leland Sisson with Richard P. Lucas dated July 26, 1971, Gerald N. Jakobowitz, Counselor at Law, Walden; envelope dated September 11, 1975 from the General Motors Acceptance Corp. containing a thank you for your last payment to Richard P. Lucas also containing a retail installment contract, by your name Richard P. Lucas, describing a new 1973 9 cylinder Chevy crew cab for a 1972 Dodge sports van; letter dated September 11, 1975 to Richard P. Lucas from Charles Roskoski with a letter from Charles Roskoski to Richard P. Lucas dated September 10, 1975; white piece of paper via Cooper-Jarrett with half of 9/20/75 gross 14029.23, WH, 2,174.60; ST 701.40 via, $824.85 $828.68 was the F.I.C.A.; one driver's daily log book starting with 9/1/75 going to the date 10/1/75; one leather buckle type log book cover containing a travel map, North East, including New York, New England area; travel aid interstate map and directory cover; Sunoco New York map; an envelope of the C.J. Shuttle Service containing a color picture of a man; two pages of a poem headed "These men with broken hearts"; four Cooper-Jarrett road driver's daily round trip pay sheets, one for October 10 and one for October 9, and one for October 8 and one for October 4; sixteen Massachusetts Turnpike Authority charge trip authorizations; six New York State Thruway charge trip authorizations; six New York State Thruway charge trip authorizations; and a photostatic article headed "To our leway"; and a pocket of a leather

case is a blue piece of paper postage will be paid and a 50 cent piece, and a Franklin piece; also in the container is a shocking pink and red ballpoint red pen; and a log book of October 2, 1975, to October 10, 1975, Cooper-Jarrett; piece of green paper foil and miscellaneous pieces of paper foil wrappers and foil; an old raisen and a piece of stone; Holiday Inn matchbook, a matchbook folded up in a Kool pack; copy of Deliverance by James Dicky; an unidentifiable piece of something, paper, a letter of the State of Connecticut, Surrogate Court, third circuit of July 3, 1974; letter of the New York State Executive Department of Youth of October 6, 1975 to Carl Lucas; a Ford passenger invoice for serial #832128; an envelope from the New York State Executive Department of Youth, October 6, 1975 addressed to Mr. Carl Lucas; a blank form headed "Your child is allowed to make one call."; a pamphlet of the Division of Youth, Goshen Center, medical card, "I hereby give my permission, etc" clipping from newspaper, Monticello entries on the back, a picture of Jim Migli; seven wage payment envelopes of the First National Bank of Highland; a toothpick in a paper container; seventeen deposit slips on the First National Bank of Highland, New Paltz, New York; a memorial for a friend and relatives for Lloyd D. Graham, Sr.; a form of the Wright Employment Agency with the name Mark Green written on it; a paper napkin with red lines and zags written all over it; and some handwriting on it; envelope of the Orange County Department of Social Services addressed to Richard Graham, September 22, 1975, containing therein a brochure of public assistance programs and a letter of September 13, 1975, decision form, O.C.P.A. 132; a small piece of note paper writing on one side headed "Scott's Corners"; a piece of note paper with writing on it one side headed "Al Serv", a tape from an adding machine; 252717A, tape $20.30 on one side and headed telephone Comp.; a picture badge showing Santa Claus, a woman and a child; six postcard of the Holiday Inn, Dayton Beach, Florida; a pink lady's wallet containing a picture of a young man headed, written on the back to Iris, in the beginning; a picture of the Defendant,

Graham from a penny arcade machine, written on the back, husband and Richard, first year; a social security card number for Iris K. Graham and employment identification card of the Public Employment Service for Iris Graham, only date on it February 3, 1973; a student identification card, Newburgh Free Academy to Iris Gineis embedded in plastic; a picture of a man and a dog; identification card of Iris Graham, 63 Pierpoint Avenue, Newburgh the passenger registration to Iris K. Graham, expiring December 31, 1972; a picture of a little girl, postage size, another picture of another girl, torn, black and white picture, a picture of a young lady and what appears to be a money. Written on the back, Iris and Che Che, 1968; two postage size pictures -- four postage size pictures of young children in color; a picture of Christ in a plastic container; a billfold, another picture of Christ; a picture of brother at graduation; picture of a baby and a young girl Mary Molinski; picture of a young lady to Iris, words cannot describe; picture of a young man headed on the back partially cut up to Iris, "best of luck"; picture of Defendant Graham taken in a penny arcade machine. That's it. A Zerox list of numbers headed Lake Street, Extra, #5342384 and with some handwritten items on it; a receipt of Scott's Corners Service, September 25, 1975, $552; another deposit slip of the First National Bank of Highland, New Paltz, New York, blank; a receipt of the Holiday Inn of Daytona Beach, 260941 and a blue and white Bic pen, Mid-Valley Oil Co. written on the First National Bank of Highland receipt;

Exhibit #	Description of Items	Described at R/A page
13	Miscellaneous books, papers and otheritems from rear left floor of car consisting of:	38, 88

book, Ferdinand by Monroe Muneo Lief; a Storytown coloring book; copy of Oui magazine for November, 1975; a copy of Playboy magazine for November, 1975; a Ginn basic reading, Fun with Tom and Batter of Deborah Kilb; a blue sock and a child's

school paper, very light writing, and I see the words "the best of all" on it;

Exhibit #	Description of Items	Described at R/A page
14	Mirror removed from sun visor of car with fingerprint	38, 88
15	Scraping of dry oil from front bottom of car and scrapings of dirt from under car	38, 88
16	Miscellaneous papers, matchbooks and watch consisting of:	39, 88-89

matchbooks, one thousand personalized address labels; Winston, all names of matchbooks; Shurfine, Veretti House, Gerrys Corner Inn; another Shurfine; Costa beverage, another Costa beverage, four Bic pens, name of a matchbook cover, Foodtown, the Finast Food Markets; another Shurfine, another Costa beverage, Macke Food and Vending Services; another personalized note stationery; Cocoa Cola and Writewell Co; a Mickey Mouse watch; eighteen rectangular paper plates, empty; a Times Herald-Record of May 24, 1974; a bag headed Stationery, Holiday Inn, containing two envelopes blank and threepieces of blank Holiday Inn stationery; two personalized bath mats and one in paper and one in cardboard; another bag containing Holiday Inn stationery; a bag also saying Holiday Inn stationery with two evelopes, three pieces of paper; a Taggart Driving School matchbooks and a Winston Cigarett matchbook;

Exhibit #	Description of Items	Described at R/A page
17	White rope	39
18	Book of matches from Holiday Inn, Ramsey	39
19	One expended round of 12 gauge shotgun ammunition	39
20	Car key, trunk lid, and entire car	40, 105-106

21	License plates of the car	40
22	Rifle [illegible] from trunk	41
23	Several rounds of shotgun shells from trunk	41

In The

Supreme Court of the United States

October Term, 1979

No. 79-6182

RICHARD GRAHAM,

Petitioner,

-against-

THE PEOPLE OF THE STATE OF NEW YORK,

Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK, THIRD JUDICIAL DEPARTMENT.

Office of the District Attorney
Sullivan County, New York
By: STEPHEN F. LUNGEN
Special Prosecutor
Attorney for Respondents
6 North Main Street
Liberty, New York 12754
(914) 292-4444

Supreme Court, U. S.
FILED
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2. This case is clearly distinguishable from People v. Payton and Riddick 45 N.Y. 2d 300, which is currently pending before this Court. 7

3. The evidence obtained from the motel subsequent to the petitioner's arrest did not contribute to the petitioner's conviction. 9

4. The Trial Court's ruling of the admissibility of the petitioner's confession was not in conflict with constitutional guidelines. 11

5. The search of the Lincoln Continental automobile was not in violation of the Fourth Amendment. 12

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STATUTES INVOLVED

Criminal Procedure Law of New York
Section 120.80 (4)
Section 140.15

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OPINIONS BELOW

The opinion of the Appellate Division of the Supreme Court of the State of New York, Third Judicial Department is reported at 69 A.D. 2d 544, 419 N.Y.S. 290. The opinion of the Sullivan County Court denying the suppression motions of petitioner and Richard Lucas is reported at 90 Misc. 2d 1019, 396 N.Y.S. 2d 966. Both of the referred to opinions are attached to the petition.

JURISDICTION

The jurisdiction of this Court to review the judgment below rests on 28 U.S.C. Section 1257 (3).

QUESTIONS PRESENTED

1. Did the arrest of the petitioner comply with the Fourth Amendment of the United States Constitution standards of reasonableness?

2. This case is clearly distinguishable from People v. Payton and Riddick 45 N.Y. 2d 300 which is currently pending before this Court.

3. The evidence seized upon the arrest of the petitioner in his motel room had independent sources as contemplated by Silverthorne Lumber Co. v. United States 251 U.S. 385 (1920).

4. Did the Appellate Division, Third Department, correctly apply to the motel search the harmless error doctrine of People v. Crimmins 36 N.Y. 2d 230 and Chapman v. California 386 U.S. 18?

5. Did the Court properly determine the admissibility of the petitioner's confession under the Fourth, Fifth and Fourteenth Amendments of the United States Constitution?

6. Did the Appellate Division, Third Department, properly determine the admissibility of evidence coming from the search warrant executed upon the co-defendant's automobile?

FACTS

The facts of this case are set forth in great detail in the Trial Court's opinion which is located at 90 Misc. 2d 1019, 396 N.Y.S. 2d 966 through 969 (1977). Additionally, the facts were further summarized by the Appellate Division, Third Department in their opinion at 69 A.D. 2d 544, 419 N.Y.S. 2d 290 through 292 (1979).

The petitioner sets forth a statement of the case and, without getting into great detail, some exceptions to that statement are in order. Taking them in the sequence that they appear in the petitioner's statement, they are as follows:

(1) The Trial Court and the Appellate Division, Third Department, found that the arresting officers believed at the time of their entry into the petitioner's motel room that an arrest warrant had in fact been issued in the State of New York. This fact was evidenced by the reception of teletype messages to the Florida authorities working with the New York State Police confirming that the arrest of the petitioner and his co-defendant should be made for the crimes of murder, kidnapping and robbery and this confirmation occurred the evening prior to the arrest. (RA 13-23)

(2) The petitioner's statement implying that the police lacked information concerning the Doberman Pinscher dog's whereabouts with respect to the motel room is incorrect. The evidence proved that the police earnestly believed that the Doberman Pinscher dog was located within the motel rooms. This was evidenced by the testimony of one of the arresting officers wherein he wrapped a towel around his arm prior to entry for his protection. These facts were credited by the Trial Court and the Appellate Division. (RA 213-214)

(3) The petitioner's contention that the evidence taken from the motel room was utilized against him in the taking of the confession is incorrect and not substantiated by the evidence found by the Trial Court. Only the petitioner testified to its use. The police officers that questioned the petitioner were not the ones doing the inventorying of the property and they testified that none of it was shown to the petitioner during any of the questioning proceedings.

The petitioner has attached as Appendices F and G a purported list

of the property recovered from the co-defendant's vehicle and the motel rooms after arrest. The list, as it is portrayed in the appendix, is extremely misleading since it is given completely out of context with respect to the manner in which the items were seized. The petitioner has gratuitously separated the items seized into individual papers and exhibits tremendously inflating the actual number of items obtained. (For example, the police obtained the petitioner's wallet at the motel arrest. This wallet is reflected by a listing of each individual item found within it, rather than listing a single exhibit.)

REASONS WHY THE WRIT OF CERTIORARI SHOULD BE DENIED

I

The New York State Appellate Division, Third Department, held that the arrest of the petitioner by the police was based upon probable cause, the good-faith belief that an arrest warrant was issued, exigent circumstances and statutory authority permitting a warrantless and noticeless entry for the purpose of effectuating this arrest. That decision is in conformity with New York State, Federal and Constitutional standards.

In Ker v. California 374 U.S. 23, 31 the Court made it clear that their prior decisions were not to be construed as an:

> "...assumption by this Court of supervisory authority over state courts, cf. Cleary v. Bolger 371 U.S. 392, 401 (1963), and, consequently, it implied no total obliteration of state laws relating to arrests and searches in favor of federal law."

The Court went on to state at Page 34 that:

> "The States are not thereby precluded from developing workable rules governing arrests searches and seizures to meet 'the practical demands of effective criminal investigation and law enforcement' in the States, provided that those rules do not violate the constitutional proscription of unreasonable searches and seizures and the concomitant command that evidence so seized is inadmissible against one who has standing to complain".

In Ker v. California, Supra, the Court upheld an arrest performed in almost the identical fashion as was done in this case.

It was an arrest effectuated pursuant to State statutes allowing noticeless entry upon exigent circumstances through the use of a passkey. Additionally, the arrest was made without a warrant, although based upon a finding of probable cause. The Court held that the arrest sanctioned by California law was:

> "...not unreasonable under the standards of the Fourth Amendment as applied to the States through the Fourteenth Amendment. (See Page 41)".

The petitioner herein initially seeks to have this Court review the facts in order to determine that probable cause was lacking. There is no question that this Court has that power, provided there are contradictory factual questions that require its determination with respect to whether the lower court's decision as to the constitutional standard of reasonableness has been respected.

The most oft cited definition of probable cause comes from Brinegar v. United States 338 U.S. 160, 175-176 (1949) wherein the Court stated:

> "The substance of all the definitions" of probable cause "is a reasonable ground for belief of guilt."... And this "means less than evidence which would justify condemnation" or conviction.... Since Marshall's time, at any rate, it has come to mean more than bare suspicion; probable cause exists where "the facts and circumstances within their (the officers') knowledge, and of which they had reasonably trustworthy information, (are) sufficient in themselves to warrant a man of reasonable caution in the "belief that" an offense has been or is being committed...."

The Trial Court resolved the factual question that probable cause existed (utilizing the above definition) and the Appellate Division, Third Department, concurred.

The petitioner's contention that the New York Courts applied the wrong standard, that is, a "reasonable suspicion" standard rather than "probable cause", is not substantiated by the record. The Court's ruling on "probable cause" was based upon the constitutional standards as enunciated by this Court.

Since the lawfulness of any arrest without a warrant must in the first instance be based upon probable cause, the findings of the Court below are not in conflict. This determination does not end the petitioner's allegations with respect to the propriety of the arrest. The arrest proceedings occurred in the motel room of the petitioner, based upon a noticeless entry. The petitioner seeks to have this Court define the limits or the exceptions which would justify a noticeless entry. Such a determination on the facts in this case is not required.*

It has already been stated that this Court has permitted a warrantless and noticeless arrest made in conformity with State statutes based upon probable cause and exigent circumstances (Ker v. California, Supra). New York has a similar statute that allows for a warrantless arrest based upon certain enumerated exigent circumstances. Section 140.15 of the Criminal Procedure Law of New York allows for an arrest without a warrant and for an entry upon premises to effectuate that arrest in the same manner as would be authorized under the provisions allowing such an arrest with a warrant. In that regard, Section 120.80 (4) states as follows:

> "In order to effect the arrest, the police officer may, under circumstances and in a manner prescribed in this subdivision, enter any premises in which he reasonably believes

*The arresting officers in this case believed that at the time of their entry into the motel room to effectuate the arrest the New York State Police authorities had obtained an arrest warrant, as requested the night before.

the defendant to be present. Before such entry, he must give or make reasonable effort to give, notice of his authority and purpose to an occupant thereof; unless there is reasonable cause to believe that the giving of such notice will:

(a) Result in the defendant escaping or attempting to escape; or
(b) Endanger the life or safety of the officer or another person; or
(c) Result in the destruction, damaging or secretion of material evidence."

The courts below found that the arrest of this petitioner was properly effectuated pursuant to 120.80 (4) (b). They held that the police effectuated this arrest knowing that the defendants were fugitives from a heinous murder, that they hastily fled from the murder location near where they resided in New York to the State of Florida, that the murder weapon was still missing and that the defendants might be armed. They knew that the defendants were in the motel rooms in question and that a Doberman Pinscher was believed to be present as evidenced by the actions of one of the arresting officers, when he wrapped a towel around his arm prior to entry for protection.

There is not now, nor has there ever been, an attack by this petitioner on the constitutionality of the New York State statute. Additionally, the State of Florida, where this arrest took place, has a similar statute, and their highest Court has held that where exigent circumstances and probable cause exist, an unannounced arrest would be proper if the officer's peril would be increased if he gave notice (see Florida statutes, Section 901.17, 901.19 (1) and Benefield v. State 160 So. 2d 706 (1964)).

Numerous United States Circuit Courts of Appeals have discussed the issues involved here. The most extensive discussion can be found in United States v. Reed 572 F 2d 412, 417 (Second Cir.) cert. denied 439 U.S. 913, 99 S. Ct. 283, 58 L. Ed. 2d 259 (1978). The issue to be decided there was:

"....whether and under what circumstances the Fourth Amendment permits federal law enforcement officers to enter a suspect's home in order to effect a felony arrest for which the officers have both statutory authority and probable cause but no warrant."

The Court therein recognized that the Supreme Court has not spoken directly on that issue. After lengthy analysis, the Court concluded that in the presence of exigent circumstances, such an arrest was constitutional. The Court took cognizance of the decisions holding that the Fourth Amendment was intended to protect private citizens in the sanctity of their own homes and that freedom from such intrustions is the very purpose for which the Fourth Amendment was intended. With all of the safeguards and prior decisions in mind, the Court still held at Page 424 that:

"...in the absence of a warrant to arrest a suspect at home, and in the absence of exigent circumstances, federal law enforcement officers are prohibited by the Fourth Amendment from entering the home of a suspect to effect a felony arrest for which they otherwise have both statutory authority and probable cause."*

In the Court's determination as to whether exigent circumstances are present, they adopted the criteria enumerated in Dorman v. United States 140 U.S. App. D.C. 313, 435 F. 2d

*Conversely, the presence of exigent circumstances given the other requirements would permit a warrantless arrest.

385, 392-393 (1970) wherein the following were set forth (see United States v. Reed, Supra, Page 424):

> "These include (1) The gravity or violent nature of the offense with which the suspect is to be charged; (2) Whether the suspect is reasonably believed to be armed; (3) A clear showing of probable cause...to believe that the suspect committed the crime; (4) A strong reason to believe that the suspect is in the premises being entered; (5) A likelihood that the suspect will escape if not swiftly apprehended; and (6) The peaceful circumstances of the entry."

In Dorman, Supra, the Court also listed as another consideration the time of the entry.

Based upon the foregoing, the noticeless entry to effectuate the petitioner's arrest was valid, as it was based upon probable cause, statutory authority and the presence of each of the above listed and accepted exigent circumstances. Further, the entry by the police occurred during the morning hours (not a nighttime entry, which in this case was specifically determined not to be made).

United States v. Reed, Supra, Footnote 7 at Page 421 indicates that their decision is in accordance with the Sixth, Ninth and District of Columbia Circuits. (See United States v. Williams 604 F. 2d 1102 (1979) where the exigent circumstances of Dorman, Supra, were utilized in the Eighth Circuit.)

It can, therefore, be concluded that the petitioner's arrest was not violative of the Fourth Amendment standards of reasonableness, nor are there any conflicting decisions of other Circuit Courts of Appeals or sister states with respect to the arrest procedure.

II

> This case is clearly distinguishable from People v. Payton and Riddick 45 N.Y. 2d 300 which is currently pending before this Court.

The petitioner's contention that certiorari should be granted herein, in order to enable the Court to dispose of this case in light of its decision to be rendered in Payton and Riddick is unnecessary.

In Payton and Riddick the New York Court of Appeals decided that the police may enter the home of a defendant for the purpose of effectuating a warrantless arrest based upon probable cause but in the absence of exigent circumstances. The petitioner's case substantially differs in that exigent circumstances were present and the police acted under the good-faith belief that an arrest warrant existed at the time of their entry to effectuate an arrest based upon probable cause.

The facts of Payton and Riddick are clearly distinguishable. In Payton, when the police came to the defendant's apartment, they were present without an arrest warrant and without knowledge of the defendant's presence. In Riddick the police came to the defendant's house without a warrant for the purpose of arresting him for robberies committed two years earlier.

The petitioner was arrested in his motel room by the police for an intentional murder committed several days prior, from which the petitioner hastily fled the State of New York to Florida immediately after the commission of the crimes. An extensive police investigation established a "checkerboard

square" of evidence pointing directly at the petitioner and his co-defendant providing the requisite probable cause for their arrest. The police, acting responsibly, requested and believed that an arrest warrant existed, peacefully and without notice, entered the motel room effectuating the arrest (upon the exigent circumstances as outlined previously).

Lawrence H. Cooke, Chief Judge of the Court of Appeals for the State of New York, filed a dissenting opinion in the Payton and Riddick cases in which he questioned the majority's decision permitting the non-consentual entry in the absence of exigent circumstances and without review by a neutral magistrate on the question of a warrant authorizing the arrest. The concern expressed by Judge Cook in the Payton case involves factual situations not present here. His strong concern under the Fourth Amendment protections for a neutral magistrate's review was for all intents and purposes complied with by the police as the arresting officers believed a warrant existed. The additional concern expressed by Judge Cooke allowing an arrest of this type in absence of exigency, is not present.

The petitioner sought leave to appeal the decision of the Appellate Division, Third Department, to the New York Court of Appeals. The matter was set down for argument before Judge Cooke to determine whether leave to appeal would be granted. During the course of the argument, Judge Cooke expressed his view that this case was not the same as Payton because of the existence of exigent circumstances. Leave to appeal was thereafter denied.

The decision of the Appellate Division, Third Department,

need not be reviewed in light of this Court's decision to be rendered in Payton and Riddick, since the cases are clearly distinguishable, and this decision is not in conflict with existing Supreme Court or Federal Circuit Court of Appeals' decisions.

III

The evidence obtained from the motel subsequent to the petitioner's arrest did not contribute to the petitioner's conviction.

The Appellate Division, Third Department's decision indicated that the search of the motel may have been overbroad under the guidelines established in Chimel v. California 395 U.S. 752. The Court found that the evidence against the petitioner was so overwhelming that the items admitted at trial from the motel, if they be in error, were harmless under People v. Crimmins 36 N.Y. 2d 230.

The petitioner's contention that the Appellate Division justified the search on the basis of the confession does not have support under the facts of this case. The Court's determination was clearly an evaluation of the total evidence presented against the petitioner in light of the items received from the motel. It concluded that there was no constitutional error as enunciated in Chapman v. California 386 U.S. 18 because there was no reasonable possibility the error might have contributed to the petitioner's conviction and it was, therefore, harmless beyond a reasonable doubt.

If a search is improper, it can only have contributed to a defendant's conviction if the proceeds of the search are

utilized at the trial. An overbroad search where the items obtained are not utilized at trial certainly cannot contribute to a conviction unless additional evidence obtained can be found to be the "fruits of the poisonous tree". In the instant matter only five items of evidence were produced at trial stemming from the motel search, and the first of such items introduced was done so by the defense. Additionally, each of those items had an independent source known to the police prior to their seizure, and this was established at the pre-trial suppression hearings. These independent sources are consistent with prior holdings of this Court as exemplified in Silverthorne Lumber Co. v. United States 251 U.S. 385 (1920).

Nor can credence be given to the petitioner's allegations that had it not been for the motel search there would not be a confession, therefore, they are all "fruits of the poisonous tree" as enunciated in Wong Sun v. United States 371 U.S. 471. The defendant was lawfully arrested and taken into custody by the police prior to the inventory of his motel room. His lengthy confession was a product of that lawful arrest totally disconnected in time and place from any of the items gathered by the police from the motel.

The Appellate Division's determination with respect to the lawful arrest, the motel search, the overwhelming proof against the defendant once his lawfully-obtained confession was admitted into evidence, and the harmless error doctrine is consistent with New York Law, the Fourth Amendment of the United States Constitution and the Supreme Court cases interpreting these issues.

IV

The Trial Court's ruling of the admissibility of the petitioner's confession was not in conflict with constitutional guidelines.

The petitioner attempts to assert that the Trial Court determined that the confession was voluntary based upon the sole consideration of its truthfulness. This is an inaccurate account of the testimony introduced at the pre-trial suppression hearings and of the Trial Court's findings.

The Trial Court found in the first instance that the confession was voluntary under the constitutional protections of the Fifth and Fourteenth Amendments as being freely and voluntarily made. This aspect was gone into in depth at the hearing as it was proved that the defendant's contention of a coerced confession was not credible. The Trial Court found that this confession was not the product of any overreaching or mistreatment by the police.

The Court also determined that the confession did not violate the principles set forth in Miranda v. Arizona 384 U.S. 436 since the defendant was adequately apprised of his constitutional rights several times prior to his confession, and those rights were preserved both in writing and on a tape recording.

Additionally, the Court determined that the arrest was lawful and that the confession was not the fruits of illegal police conduct. The Court specifically reviewed Brown v. Illinois 422 U.S. 590 finding that this arrest was not investigatory, but based upon probable cause and for the purpose of prosecution.

The standard of truthfulness as complained by the petitioner herein was not the criteria utilized for admissibility. The Court considered truthfulness only with regard to the defendant's contradictory testimony at the suppression hearing when he alleged that the police coerced his confession. (RA 338-339). Nothing in that finding violates the principles as stated in Rogers v. Richmond 365 U.S. 534, 544 where the Court stated that:

> "The attention of the trial judge should have been focused, for the purposes of the Federal Constitution, on the question whether the behavior of the State's law enforcement officials was such as to overbear petitioner's will to resist and bring about confessions not freely self-determined...."

This was clearly the focal point of the trial judge here.

V

The search of the Lincoln Automobile was not in violation of the Fourth Amendment.

The petitioner contends here, as he did before the Appellate Division, Third Department, that the second entry into the Lincoln automobile was a warrantless search in violation of the Fourth Amendment protections.

Initially, the police obtained a search warrant and pursuant thereto, searched the Lincoln Continental on October 17, 1975. Thereafter, on October 20, 1975 the vehicle was again dusted for additional fingerprint evidence based upon information stemming from the defendant's confession. In that second inspection four fingerprints were developed on the inside portion of the trunk lid which were later positively identified as belonging to the victim of the homicide.

The search warrant provided for the search of fingerprint evidence from the automobile and the return of the search warrant indicated, as one of the items of property seized, the automobile itself. Additionally, immediately before and after the search, the vehicle was kept under constant surveillance by members of the New York State Police through the second inspection and even after the arrest.

In effect, the automobile was seized by the police on October 17, 1975 as evidence of the homicide pursuant to a valid and lawful search warrant. As part of the probable cause for the warrant and the reasonable inferences that flowed from the facts, the police could reasonably infer that the automobile was used in some manner in the commission of these crimes. The police certainly have the right to inspect and examine evidence that is already seized and within their control in a manner that is convenient and suitable for the purpose of their investigation. Whether these items of evidence are examined once or numerous times does not in any way invalidate the already lawful seizure and only the legality of the initial seizure is in question, and that has already been ruled as proper.

This fact situation is clearly distinguishable from Mincey v. Arizona __U.S.__ 98 S. Ct. 2408 (1978) where the police conducted an exhaustive four-day warrantless search of the apartment where the defendant was arrested under the guise of a "murder scene exception". The Fourth Amendment here was fully complied with by a neutral magistrate issuing a proper warrant and pursuant thereto, evidence was seized. Its subsequent reinspection for additional information is not a second

entry that can be viewed as a warrantless search as alleged by the petitioner.

CONCLUSION

For the reasons stated herein, the petition for Writ of Certiorari should be denied, in all respects.

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Respectfully submitted,

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